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PARAMOUNTCY

IN

INDIAN CONSTITUTIONAL LAW

*A study of the legal aspects of the relationship between
the Indian States and the Government of India
from the days of the East India Company
down to the present time.*

By

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With a Foreword by
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and
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Most Respectfully Dedicated

to the

Hon'ble Sardar Vallabhbhai Patel

'Architect of the Indian Union

FOREWORD.

Mr. Raghunathrao's treatise on Paramountcy deserves a very warm welcome. It is not possible to define Paramountcy with any precision and in the absence of a precise definition it is equally difficult to determine its scope. It is more a political power than a legal right. In its bearing on India, its essential meaning is the authority of the Crown, in its capacity as sovereign of India, over the Indian States under its protection. On August, 15, 1947, British Paramountcy lapsed and presumably it devolved upon the successor Dominion Government, though the States put forward a claim for independence on the lapse of British Paramountcy. This raised a momentous national problem, and high controversy raged as to the incidents of the alleged lapse of British Paramountcy. Thanks to the able statesmanship of the States Ministry, and the prudence, foresight and patriotism of the Indian Princes, the apprehended mischief was averted and the States have been smoothly transformed into compact democratic units eligible for a place in the constitutional structure of the forthcoming Union. The fate of Hyderabad is unfortunately still hanging in the balance.

Although Paramountcy is no longer a living political problem as it was some months ago, it has not lost its doctrinaire value. It holds a unique place in the realm of constitutional law and politics. A perusal of Mr. Raghunathrao's treatise will reveal the vastness

and complexity of the subject. He has dealt with the theme exhaustively. His treatment is at once analytical, critical and historical. By comparing Paramountcy with allied concepts like suzerainty, he has brought home its individuality and has succinctly delineated the uneven course of the institution from its genesis down to the present day. He professes to address himself to an objective and dispassionate scrutiny of the legal aspects of Paramountcy, but his personal predispositions are rather transparent. In fact it is not easy for any student of an imperial institution like Paramountcy to forget or conceal his predispositions. This becomes particularly difficult when one undertakes a critical review of an arbitrary and autocratic system, and that too soon after its extinction.

I have gone through the book with great interest. Many problems discussed in it belong to the past; but for an academic lawyer some of them may still be regarded as living. The very idea of Paramountcy provoked questions difficult to answer. As they were not justiciable, no authoritative judicial interpretation can be found. A few of those questions are affecting some contemporary controversies too, such as, " Was Paramountcy unassignable ? ", " Were the Indian States at any time independent and sovereign ? ", " On the lapse of British Paramountcy, who were the reversioners of power, Princes or their People ? " " Is there any inherent Paramountcy in the Dominion Government ? ". Mr. Raghunāthrao has attempted to tackle these and other problems in his own way,

and he deserves to be congratulated on his thorough examination of many such diverse aspects of Paramountcy. He has brought to bear upon his treatment of the subject an intimate knowledge of Constitutional Law, Jurisprudence and International Law. He has drawn considerable data from the spheres of political science and history. This is as it should be; for no complete understanding of the scope of Paramountcy is possible without reference to cognate subjects.

I wish this book had been brought out a year earlier. Its belated publication, however, does not in any way detract from its intrinsic worth. Sufficient space has been devoted to current events and problems, and this has saved the book from being merely a history of Indo-British administrative relations. I can unhesitatingly commend it as a clear and able exposition of the complex concept of Paramountcy, disclosing the erudition and judgment of the author. I hope it will prove useful to students of law, politics and history, and it deserves a place in the library of every lawyer and politician, as a valuable addition to the scanty literature on such an important, yet elusive subject.

Kolhapur:
15-8-1948.

N. S. Lokur.

PREFACE.

At first sight it is not unlikely that my book may appear like a post-mortem report; for Paramountcy as an imperial system, has ceased to be. Hosts of States which were an anachronism have gone off the political map of India. Many of the Princes have proved to be the architects of their own misfortune; having forfeited the goodwill of their subjects they have lost their Princedom. There is only one grave problem facing the nation. At the peak of the feudal pyramid, whose very foundations have been rudely shaken, sits the Nizam. His administration has become extremely rickety; but with an amazing lack of a sense of realism, he has assumed a most uncompromising attitude on the twin questions of accession and responsible government. He cannot play the game indefinitely.

It is heartening to read the White Paper on Hyderabad. Unequivocally it dismisses the Nizam's special claims to preferential treatment, for "under British Paramountcy his position was anything but of pre-eminence." It reiterates the Paramountcy of the Dominion *vis à vis* the states on the ground that, "As regards the operation of Paramountcy in relation to essential matters.....the fundamentals on which it rested still remain." The National Government has its Paramountcy secured by its paramount position; for, it was "not that the British possessed paramountcy rights and were therefore paramount, but that they were paramount and therefore had paramountcy." Then follows the summary rejection of the claims of Princes that they have become independent and sovereign. The States Ministry recognises that "sovereign rights which reverted to the States.....vest in the people." This is the last word on the controversy between the Princes and their people as to rights of reversion.

Apart from the Hyderabad problem there are still some issues which are the bequest of the old States System. Ere long what remains of 'the ulcer,' as Dr. Pattabhi Sitaramayya calls 'the 562 *Ulsters*,' may have to be removed by a drastic operation. Accession to the Dominion on the three subjects is not an end in itself. Hereditary monarchy may have no place in a world fast drifting towards socialism; the British example is exceptional. How many Indian

Princes are willing to leave the questions of succession, the religion they profess, and also their freedom in such personal affairs as marriage and divorce, to the wishes of their people? Students of Constitutional Law need not be told how the King of England has no choice in these matters. Are the Indian Princes prepared to follow him?

Much has happened since the last chapter was written. Events have outpaced the printer. In the successful exercise of their inherent right of self-determination the States' people have so speedily brought about momentous changes in the States' structure that between now and when this volume reaches the reader's hands there may be further surprises. Sandur is incorporated in the Bellary District; Mayurbhanj is in the melting-pot; Baroda is in the throes of a forced abdication if not actual deposition. But these matters cannot be dealt with now and here; I have no desire to convert a Preface into a Postscript.

The reader may notice a shifting of the 'tense sense' from chapter to chapter. The rule of sequence has not been wantonly or negligently violated. Some chapters were written when what is past now was present then. Secondly, whenever Paramountcy as a doctrine is referred to, the present tense is used. In any case the reader may treat an occasional departure from the past tense as an employment of the historic present. I must plead guilty of regrettable lapses in proof-reading. The reader is requested to use the *corrigenda*.

I am immensely grateful to the Hon'ble Mr. N. S. Lokur for the kind Foreword with which he has blessed my enterprise. His timely encouragement and advice have been invaluable. I am beholden to the writings of Lee-warner, Tupper, P. S. S. Aiyar, Keith, Paikkar, Sen, Gundappa, Julian Palmer, Latthe, K. R. R. Sastry and others, for what I have taken from them. I must express my indebtedness to the Government of Kolhapur for the liberal patronage extended to me. I am obliged to Principal S. G. Dabholkar of the Shahaji Law College for his unstinted help. Finally my thanks are due to the Arya Bhanu Press, Kolhapur, for their uniform courtesy and promptness.

Indian Independence Day, 1948.

Raghupathrao.

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PARAMOUNTCY

IN

INDIAN CONSTITUTIONAL LAW

CHAPTER I

Introductory.

British authority in India assumed two distinct but allied forms, Sovereignty and Paramountcy. "The position of the British Crown in India is that in relation to British India it exercises full sovereignty, and in relation to the Indian States it occupies the position of a Paramount Power", says Julian Palmer.¹ It could become a Paramount Power *vis a vis* the States only because of its sovereignty in British India; its Paramountcy was an adjunct of its sovereignty. In theory distinguishable, in actual operation they are inseparable. They co-exist in that authority which is supreme in India.

A study of Paramountcy necessarily involves an examination of the legal status of Indian States; but an analysis of the position of every State is neither possible nor desirable. This demands some historical investigation of the origin and career of the States which is not germane to the present purpose. What is contemplated here is not primarily a study of the position of the Indian States in general. Only such aspects as are related to the main theme claim consideration. The relations between the Indian States and the Crown were many and varied. Among these might be mentioned fiscal conventions, agreements concerning posts, railways, excise duties and so on. Even in regard to such matters the Crown has time and again asserted its Paramountcy. However its 'Paramountcy' when entering into contractual relations with the States is not Paramountcy proper whose sources and character are different. What concerns this review is the constitutional significance of Paramountcy, not its political or economic ramifications.

Paramountcy comprehends law, politics, and history. It has signified a constitutional right as well as an imperial privilege. It

1. *Sovereignty and Paramountcy*, p. 12

has also connoted some obligations. Although we are interested mainly in the legal aspects of the institution, it is not possible to ignore the other aspects totally. To divorce them would be to deprive Paramountcy of its meaning, as they are closely allied to one another. History helps us to grasp the complete data without which no *legal* conclusions can be drawn. The political element is equally important. Paramountcy was first a political fact before it put on a legal garb. Therefore such material from history and political science as has some direct bearing upon Paramountcy deserves inclusion. Political opinions concerning practical administrative problems are scrupulously eschewed as they are meant more for the statesman to tackle than for an academic worker to write upon. But no complete understanding of any topic touching constitutional law is possible without reference to certain politico-legal concepts like state, sovereignty, federalism and so on. This is particularly so in the case of Paramountcy which has more political than legal affinities. Some principles of general jurisprudence and international law are occasionally discussed. They facilitate a comparative and dialectical appreciation.

Has Paramountcy any place in a legal study? If it has, to what department of juristic thought can it be assigned? It must at the outset be admitted that there is more politics than law in Paramountcy. "It is sometimes claimed that the relations of the Indian States with the Paramount Power are governed by political and not by legal considerations", but, continues the author "there has been a constant appeal to notions of rights by both parties, and also on the whole to the cogency of particular branches or principles of law in regard to this problem."¹ Paramountcy offers sufficient material for a legal study; apart from being an imperial authority it professes to possess some legal attributes as well. "That there is no definite body of accepted law on the subject"² is substantially true. In answer to "Is Imperialism subject to any law

1. Palmer, *op. cit.* pp 3-4;

2. Gundappa, *Indian Independence Act*, p. 6;

available in the armoury of lawyers?"¹ we may say that though Paramountcy lies outside the pale of *ordinary law*, it has considerable legal interest. "It is now a matter to be decided by a lawyer"² observes Edward Thompson. In trying to find out a system to which the relations between the Crown and the States could be referred, Sir Leslie Scott says: "There is no legal decision to serve as a precedent, no complete analogy to guide. Resort must be had to first principles of law. ... It is almost a virgin field for the lawyer."

Recognition of the fact that Paramountcy is not bereft of legal value does not solve the difficulty of locating its proper place in the wide world of law. At this stage suffice it to say that it is a special branch of Indian Constitutional Law which in turn forms a part of the Constitutional Laws of the British Empire. The view that it "belongs to the domain of the Constitutional Law of Great Britain"³ cannot be supported. Though the principles which guided the conduct of the Crown in its intercourse with the Indian States are not capable of any precise definition, they have been frequently recognised as possessing some constitutional character. They were mostly derived from legal or legally recognised sources and were, to a large extent, developed and supplemented by conventions. It is true that the *absolutist theory of the Crown's imperium* has been the most potent and almost the decisive factor in the ultimate evolution of Paramountcy. But any acceptance of the truth of this proposition does not necessarily imply an admission that the institution transcends constitutional considerations. Still the task of ascertaining its due place in jurisprudence remains. It cannot by any means be treated as a subject of pure Constitutional Law. A strict definition of Constitutional Law would clearly exclude Paramountcy from its purview. Constitutional Law has been generally acknowledged to deal with the rules and conventions concerning the organisation and exercise of the sovereign authority of the State within *itself*. Where the authority is of an alien power, it ceases to be

1 & 3. Gundappa. *op. cit*, *ibid* ,

2. Edward Thompson. *The Making of the Princes*, p. 283.

constitutional Constitutional Law is a "body of rules which determines the constitution of the State. ... Its function is to determine the political centre of gravity of any State"¹ Again, "Constitutional Law is the body of rules governing the relationship between *civitas* or State-person and *cives* or subjects, and regulating the organisation of the *civitas*".² In the light of these definitions it can be seen that Paramountcy lies outside the ambit of constitutional law. It is on this ground that Lee-Warner, among others, holds that "the theory of a constitutional tie may be rejected as inapplicable"³ in regard to the relations between the Crown and the States. Unless the standard definitions of the term are unduly strained it is not possible to bring Paramountcy within the sphere of Constitutional Law.

It has been maintained that "The relationship between the Paramount Power and the Indian States is a constitutional relationship" and that "the rights and duties claimed must be examined according to the principles of constitutional law"⁴ But properly speaking, when relations of a political nature subsist between two unequal States they cannot be termed either constitutional or international. They are imperial. Yet as the Indian States are States of a qualified kind and were lying both *within* and *under* a superior State, namely the British Empire, and as the province of constitutional law is large enough to include the imperial relations between the Crown on the one hand and the diverse units of that composite polity on the other, the peculiar relations which existed between the two, partly legal and mostly conventional, may be regarded as at least quasi-constitutional. Unless this qualification is accepted, any discussion concerning Paramountcy on a constitutional plane is doomed to drift into an empirical pursuit. Constitutional Law is not a rigid steel-frame. "It is the most delicate and elastic of the kinds of law" says Palmer⁵; and so it can accommodate Paramountcy too.

1. Holland, *Jurisprudence*, p. 370;

2. Anson, *Law and Custom of the Constitution*, p. 23;

3. *The Protected Princes of India*, p. 379;

4. Julian Palmer, *op. cit.*, p. 100;

5. *Ibid.* 31.

As in regard to the subject-matter under consideration a selection of its legal aspects and the rejection of the remaining was deemed both advisable and obligatory, a similar need for some self-imposed limitation respecting the method of its study must perforce be realised. Like any other complex concept Paramountcy lends itself to a variety of approaches, analytical, historical, or critical. Mainly an analytical examination of the principal elements of Paramountcy is aimed at in the following pages. At the same time it is not intended to give a bare or bald analysis merely. Wherever necessary the subject is dealt with historically. Further occasional allusions are made to some outstanding historical facts. They serve two purposes; first, they provide an appropriate setting essential for a full appreciation of the *milieu* in which Paramountcy had its being, and secondly, they furnish apposite illustrations which reveal the diverse features of the institution. The treatment of the theme has been more or less critical.

An analytical method of study presupposes an *a priori* approach. Here the *a posteriori* course is followed as it befits the study of an institution whose evolutionary process is akin to it. Paramountcy has not been the fruit of any first or fundamental principles or *a priori* hypotheses. It is the outcome of many anomalous incidents and accidents. It came into existence *de facto* as the inevitable product of political necessity and administrative expediency. Originally it was not based on any rule of right; nor was it invested with any constitutional character. It grew more by hazard than by conscious purpose. As theorising about Paramountcy succeeded its actual establishment it is quite proper that an inductive course, of working back from effect to cause, should be adopted in its study. That military exigencies and imperial ambitions have largely determined its dimensions and role is a truism. The few general principles connected with it have been derived from particular, isolated and often disparate instances spread over a fairly long era of Indo-British political intercourse. They have necessarily to be explained with reference to their respective contexts. A proper comprehension of Paramountcy demands a restatement of its principles; not dogmatically, but in conformity with its actual

practice. Avoiding therefore the deductive method involving the "higher flights of philosophic inquiry"¹ and in a realm of abstract speculation, the safer line of reasoning may be followed. But one should not be unaware of the defects of an exclusive devotion to the *a posteriori* course. Its strong tendency of exposing one to the logical fallacy of *post hoc ergo propter hoc*, or of confusing the consequence with the sequence, must be carefully guarded against. If any study claims to be balanced, it must blend the two methods, now and then. As such a synthesis is salutary, it is resorted to, so that, each may serve as the other's complement and corrective at the same time.

Paramountcy as an imperial administrative system is dead; but it seems to have some sort of a life beyond the grave. In some form it is destined to survive its parent, the British Empire. As a singular quasi-constitutional doctrine it has now become a subject of a dispassionate, objective, and academic study. Political prejudices may die hard; but in the long run they are sure to be forgotten and possibly, the sins of Paramountcy forgiven. When there is the highly needed restoration of what Milton calls, a "calm of mind, all passion spent", a judicious and impartial appreciation of this much-maligned and twice-curst phenomenon would become possible. The second epithet is advisedly used; for, neither the Princes nor the people really liked the institution. It has "roused the hostility of the Princes without winning the gratitude of their subjects",² complains William Roy Smith. This unpopularity of the institution is intelligible; but it cannot last long. Henceforth valuable documentary evidence so far hidden in the archives of the India Office or elsewhere, may become available. Much of it has been destroyed; yet a large portion may still remain. These documents, no longer confidential, are sure to aid research, which, in its turn, is not unlikely to reveal fresh facts, explaining, condoning and probably redeeming many of Paramountcy's past acts of commission and omission.

1. Lee-Warner, *op. cit.* p. x.

2. Montmorency, *The Indian States and Indian Federation*; p. 57.

As a writer put it, we might say "Any information given is based on published data, and ... not drawn upon any confidential documents or secret information. The time for writing the inner history is still far off."

A particular perspective is a prerequisite for a clear and scientific analysis of any concept. This is not possible in the absence of a proper atmosphere. Now that the storm has passed and political agitation has yielded place to constitutional reconstruction, a detached view can be expected. Erelong a body of convincing opinion on the subject may grow and get crystallised. Proximity blurs one's vision even as remoteness does. It is only a fair distance, both in time and space, that can provide a correct view. This is possible now that Paramountcy by its political death lives as an abstract idea. It is so unique that it may be assured of a long *notional* life. It had no legal origin. Thus born, and without a precedent, it lived without a parallel. Lately it passed away leaving behind it neither heirs nor successors. But its life as an ingenious doctrine will prove abiding and not ephemeral. About its resurrection in a concrete shape it is hard to say anything. Anticipating the unknowable future is more hazardous than exploring the buried past; prophecy finds no place in the province of law. However the likelihood of its resurgence in a new form endows it with something more than a mere doctrinaire value.

1. Sir Shafa' at Ahmad Khan, *The Indian Federation*, Preface.

CHAPTER II

Nature of Paramountcy.

Defining Paramountcy with any tolerable exactitude is a task well-nigh impossible. This has to be borne in mind as an initial caveat. Attempts have time and again been made to define the expression; but the results have been far from satisfactory. The British Government seems to have wilfully ignored the need for a definition. As rightly observed by Garrat "Probably no race expect the British would have allowed seventy years to elapse without attempting to regularise and simplify the relations between the Government of India and the Indian States. Yet the position remains as complicated and as illogical as in 1858".¹ It is true the British are not known for love of theory or logic. At least they like to be so when it suits them. Their indifference to the definition of Paramountcy must be attributed more to their desire of leaving the word undefined than to any inability to declare its exact meaning. Of course there is something inherently nebulous in the word and it has baffled legal scrutiny. "Paramountcy is a peculiar species of authority, unclassifiable; indeterminate in its composition, standing by itself and not accessible to interpretation and debate under any ordinary law, or before any court known to the law of the land".² It has stood for a number of ideas and at no particular time has it lent itself to any precise statement respecting its nature, scope, and implications. A compendious term, it is more connotative than denotative; and it has in its long passage through the ages acquired diverse attributes. Its application has not been even and its amplitude has steadily increased. Its implications defy the rules of consistency. As it has substantially changed both in its complexion as well as in its magnitude, only some of its salient properties can be described. But a categorical enumeration of attributes may at best help one's understanding of the many-sidedness of the concept.

1. Garrat, *An Indian Commentary* p. 185.

2. Gundappa-*Indian Independence Act*, p. 16.

Putting particulars together, in any order for that matter, does not produce a definition. To comprehend the nature of Paramountcy one has to rely on what it was supposed to mean at any particular period as disclosed in certain relevant statments, pronouncements and declarations of policy.

It may not be out of place to state and examine the peculiar difficulties confronting one who attempts to define Paramountcy. Some of them seem insurmountable. The first problem facing an inquirer is, Paramountcy is not a pure concept. It is a hybrid having legal and political affiliations. The lawyer looks at it from a particular point of view and the politician from another. They are parallel and often become divergent. Each has his own natural professional bias. Any approach to the subject is prone to be partial unless the two attitudes are harmonised, or at least compromised. This is not an easy task. Again there are the inevitable schools of thought, both in political theory as well as in jurisprudence. Each tries to lay stress on its own interpretation of Paramountcy. One has to steer safely between them. As remarked by Sir Tej Bahadur Sapru, "the temptation to indulge in legal and constitutional theories not wholly acceptable to the facts as we find them, is as great as the temptation, on the other hand, to take shelter behind the theories of the divine rights of Kings and conceptions wholly inconsistent with the spirit of the time"¹ The principles of law, pure and simple, are as inapplicable in their entirety as the traditional doctrines of political science or philosophy.

The second difficulty to be encountered by one who tries to define Paramountcy is that it has been a progressive concept. It is no exaggeration if it is said that in its career it has exhibited a protean character and has thereby successfully defied jural analysis of any lasting value. It is not a difficult task to define a static phenomenon. It is not so in the case of one which is both dynamic and chameleonic. Even where it is possible to obtain a working

1. Sapru, Introduction to G. N. Singh's *Indian States and British India*, p. VIII.

definition, it would prove highly transitory, growing obsolete after a brief interval of time. Sir Shafa'at Ahmad Khan's words show the unwisdom of trying to provide a standard definition for a changing concept. He says, "The literature of Germany in the nineteenth century on the vexed question of sovereignty, federalism and other problems which have recurred with great frequency seems to enforce the view that in the case of a growing and developing doctrine, it is difficult to give a precise definition. Once this is done, Paramountcy will cease to grow. It will be confined within the narrow limits of a legalistic system".¹ Perhaps on an identical ground did the Indian States Committee, a body which was commissioned to define Paramountcy, decline to do so.

Thirdly, Paramountcy is a pluralistic concept. It recognises more than one ultimate principle. It has an abstract as well as a concrete sense. It represents a doctrine, a system, as well as a relationship. It means the pre-eminence of the Crown, its undisputed imperial supremacy. In this sense it stands for the political and military might of the British Crown irrespective of any constitutional right. Panikkar intelligibly regrets that "Paramountcy has become a method by which the executive of British India has aggrandized itself at the expense of the Indian States."¹ It was the outcome of a regular scheme devised for the effective imposition of the sovereign will of the British Crown through the agency of the Government of India. In short it was an imperial system designed to realise an imperial idea. It is also spoken of as signifying a relationship. Panikkar asserts that "Paramountcy is merely the expression denoting the position in which an Indian State stands to the Crown."² Elsewhere the same writer says, "The acceptance of the view that Paramountcy was only a status and did not confer any political rights beyond those which were warranted by the clauses of the treaties would have

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1. Sir Shafa'at Ahmad Khan, *The Indian Federation*, p. 108 ;
 2. *The Indian States and the Government of India*, p. 21 ;
 3. Panikkar, *Interstate Law*, p. 49.

rendered a policy of expansion impossible" ¹ This view was never accepted by the Crown, nor could it be.

The fourth obstacle to definition is the presence of views directly opposite in character. This being so it is hard to reconcile them. The spokesmen for the Crown regard Paramountcy as some super-sovereign authority, unlimited and illimitable. One of the renowned exponents of this school says: "A Paramount Power ... is defined by being undefined. ... That to which no limits are set is unlimited." ² This is exactly what the Indian States Committee preferred to put in other words: "Paramountcy must remain Paramount." The advocates of the Princes hold a contrary opinion. According to them Paramountcy is not absolute supremacy or sovereignty of the Crown over the States. It comprises only such rights as are derived by the Crown from treaties and usage. It is little more than a constitutional relationship between the Crown and the States. It is said: "The Paramountcy of the Crown depends wholly on the cessions of their rights which all the States have or must be assumed to have made." ³ According to the first view Paramountcy is all-pervasive; according to the second, it is highly circumscribed. The former may be called the over-political and the latter the over-legalistic view of the institution. In a way both these extreme notions are helpful; they caution one against an excessive allegiance to either. Wisdom lies in a safe middle course.

There is the fifth impediment to a definition of Paramountcy. The system was not established on the basis of any legal assumption. It is the product of history. A theory was only subsequently invoked to retrospectively explain and vindicate what the Crown had all along done. That Paramountcy was the fruit neither of any legal theory nor of any constitutional practice is evident

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1. Panikkar, *The Indian States and the Government of India*, P. 113;
 2. Westlake, *Collected Papers*, p. 212;
 3. Holdsworth, *The Indian States*, L. O. R. 1930.

from the following: "The idea of Paramountcy is an original political idea, forged by the British, in the factory of experience."¹ Curzon's words are quite illuminating. He said, "The political system of India is neither feudalism nor federation; it does not always rest upon a treaty; it bears no resemblance to a league."² All these are the negative aspects of Paramountcy; but they positively tell us that it is not founded upon any doctrine. In the words of Joshi "The whole conception of Paramountcy has evolved under changing political conditions. Just as Dominion Status is the legalisation of the *de facto* status achieved by the Dominions in relation to the mother country by their growing strength and position and not a status based on any *a priori* legal or constitutional theory, so also Paramountcy is the *de facto* position or supremacy achieved or assumed and asserted by the British Crown in India under changing political conditions."³ Whatever principles are associated with it are abstracted from its actual practice. It was nothing short of a diplomatic device employed to bring the States under the control of the Crown without depriving them of their formal and ceremonial attributes as States. The Princes were weakened and bolstered up; even as they gained protection they forfeited their power. They were never allowed to grow strong enough to become self-reliant. Here is a graphic description of their position. "The realm of Paramountcy has become as it were, an hospital with numerous patients, incurable but undying, a museum of decrepit and sickly administrations artificially propped up."⁴ That Paramountcy in practice should be looked into to study its many phases and that successive Governors-General have wielded it in diverse ways so that it has become necessary to interpret it realistically in order to bring it into conformity with its actual working, can be appreciated from the following suggestions: "For wisdom and instruction read the pronouncements of the Marquis of Wellesley, of Lord Metcalfe,

1. Ruthnaswamy, *British Administrative System*, p. 605;

2. *Bahawalpur Speech*;

3. Joshi, *The New Constitution of India*, p. 38;

4. Latthe, *Problems of Indian States*, p. 14;

of Malcolm and Munro, and of the Marquis of Hastings; for the way in which one man of honour should treat another, read Lord Minto; for hard facts, digest Reading." ¹

The last difficulty in regard to defining Paramountcy is the presumption or presupposition that it is not a technical term. It is quite true that it has not conveyed an unequivocal meaning; it is equally true that it has acquired a lot of secondary attributes. Is it proper, solely on that account, to deny it the status of a technical term? Some words may be born technical and others may become so. Assuming that it is not a *vocabulum artis*, Sen concludes "Therefore, it has no precise significance." ² (signification would have been correct). Merely because a word is not employed in the process of legislation or judicial administration it does not follow that there is nothing technical about it. What are the tests of a technical term? Does the technicality of a word depend on something inherent in it or upon its usage? Any term which has acquired a quality of particularity or distinctness can be called technical. Paramountcy satisfies this criterion. It is a rare word and has stood for a specific institution. However vague its implications there can be no mistaking about what it signifies. It is a "conveniently compendious word that has been given to describe the relations between the States and the British Government in India." ² But its compendiousness does not detract from its uniqueness. It is used in a special and qualified sense and with exclusive reference to the intercourse between the British Crown and the Indian States. It is a term of imperial constitutional law affecting the Indian States solely.

A brief etymological account of the term would show how it has become technical. In common parlance 'paramount' means pre-eminent. The word has retained its primary meaning; but it appears mostly in the form of an epithet. In the language of daily discourse, oral or written, the substantive 'Paramountcy' is not at all used. Political and legal usage have invested the expression with

1. Macmunn, *The Indian States and Princes*; p. 165;

2. Sen, *The Indian States*, p. 150.

a distinct meaning. The adjective 'paramount' is derived from Latin, *ad montem*, or 'to the hill,' through Old French. Originally it indicated a high place. Later on it began to have a more extended application. It metaphorically denoted any exalted position. In the Middle Ages, the King as the highest lord of the Land was called the Lord Paramount. As an euphonious and richly suggestive term it began to be used not only to signify superior status, but also to imply a position of prestige, patronage, and power. While the adjective paramount still denotes an excellence of quality, the noun Paramountcy, beginning with a capital letter, is specifically expressive of the British Crown's imperial authority over the Indian States. From the realm of ordinary language where it was used figuratively in its adjectival form it has entered the field of legal diction acquiring a new form as well as a technical character. On the ground that it is not used in common speech and that it conveys a distinct set of notions pertaining to a rare constitutional system, it is entitled to be regarded as technical. What is uncommon and particular may justly be considered special and technical.

Paramountcy was born without a name. It appeared inconduc; its christening as Suzerainty came a good deal later. Wellesley is reputed to have always acted and felt as the 'Paramount Power'. "The idea came as no abrupt inspiration, although its first clear expression as a doctrine is in Ochterlony's letter to Sir Charles Metcalfe, dated 21st March, 1820."¹ He writes thus: "I hope his Lordship will, in virtue of his power and Paramountcy forbid all future invasions"² etc., This correspondence reveals not only the employment of the term Paramountcy, but also its significant commencement with a capital letter. It is as well to be noted that "Metcalfe and Ochterlony.....formally evolved a doctrine, in a form indistinguishable from that held by Lord Reading "³ over a century later.

Does Paramountcy represent an authority of the Crown over the Indian States or is it just indicative of a constitutional nexus

1. Edward Thompson, *op. cit.*, p. 283;

2. & 3. *Ibid.*;

between the two? It must at once be stated that it plainly stands for the Crown's superior authority. There are some matters wherein the relationships savour of alliances or associations; but they need not import any equality of status. The States are at best subordinate allies and the principles governing the Crown's attitude towards them belong more to the discretionary domain of Paramountcy than to the sphere of law proper. Where any relationship arises from agreements it may be regarded as legal, for agreement is law to the parties to it. But how many rules connected with the Crown's conduct with the States are the outcome of agreements? If some are not, whence are they derived? Panikkar speaks of the necessity "for a systematic regulation of relations between the Indian States themselves on the one hand and British India on the other."¹ He regards such regulations "comprising of the general body of agreement, usage, and principles, as interstate law."¹ That Paramountcy is based, to some extent, on certain accepted legal principles, must be admitted. To that extent it may be treated as a sort of interstate law. But it transcends it. It is the law of the superior imposed on a political inferior. It is more imperative than conventional. Its sources are not limited to treaties and its range is wider than what is covered by interstate law. Interstate law, used with reference to the relations between the Crown and the States, is law to the extent of its recognition by the former.

The Indian States Committee was both qualified and competent to define Paramountcy. Fully aware of the complexities involved they refrained from defining it. They held that "it was not possible to discover any formula which will cover the *exercise* of Paramountcy" inasmuch as it was "governed by imperial considerations and the shifting necessities of the time." Pleading inability to find a satisfactory definition they wisely declared that "Paramountcy must remain paramount." With approval they cited Westlake's dictum "A Paramount Power is defined by being.

1. Panikkar, *Interstate Law*, p. 1;

left undefined"¹ and acted accordingly. The statement of the Committee appears redundant; Westlake's idea of a definition seems ingenious. The Committee was appointed to "report upon the relationship between the Paramount Power and the States" and the definition of Paramountcy was a vital issue. It was their duty to define it. But instead of solving a long-standing problem they indulged in begging the question. It looks as if they preferred to leave the word in a helpfully bazy state. There is nothing inherently undefinable in it. A definition of a term with reference to itself is not only logically fallacious as tautological, it confuses the issue. Such a definition, instead of facilitating understanding, renders the meaning incomprehensible. A definition could have raised the doctrine to the level of well-understood law rescuing it from what it was, "a system of fluid and intangible laws and conventions".²

Paramountcy may be looked at from two points of view. It is both a body of principles, actuating imperial policy as well as a political system from which certain quasi-legal principles emanate. The conduct of the Crown has often run counter to the principles contained in pronouncements and proclamations. Where theory and practice do not appear to be in harmony, the importance of the distinction between them should not be belittled. It is true that the two phases of Paramountcy, its abstract theory and concrete practice, have been mutually complementary to a large extent. But where they palpably differ, it is the theory which has been attempted to be brought into conformity with the prevalent practice. In spite of theory and practice tending to coalesce, there has been a wide gulf between what the Paramount Power professed and what it did.

The complex nature of Paramountcy is evident from the fact that it has been regarded not only as a doctrine or a system, but as an attribute also. "Paramountcy is an attribute of the British Crown in India and the various instruments.....are merely indicative

1. Westlake, *op. cit.*, p. 213;

2. Shafa'at Ahmad Khan, *op. cit.*, p. 357;

of the normal field of its operation." ¹ That Paramountcy originally did not involve the negation of full sovereignty to the Princes but did actually recognise it, is suggested by some. "Before Paramountcy came to be employed as an argument.....the Foreign and Political Department of the Government of India always held a brief on behalf of the States and it proved a wonderful champion of their rights," ² — perhaps of the Princes against their subjects! According to Panikkar, Paramountcy was a special form of imperial procedure, "a method by which the executive of British India has aggrandized itself at the expense of the States." ³

All the views, when taken together, lead to the conclusion that Paramountcy is a sum total of powers exercised and obligations acknowledged by the Crown, such powers and obligations emanating from both legal and extra-legal sources. The Crown could define its own jurisdiction over the States and was ultimately answerable to Parliament. Its Ministers owed no 'constitutional' obligations to the Indian States. As the Crown had acquired a Paramountcy over the States, its powers were wide. It is said: "The Crown has ... a right to take what measures it thinks fit for the safety of the British Empire ... This is Paramountcy." ⁴ This remark is as much an overstatement as the opinion that "The Act of 1858 ... did not give any new powers which it (the Crown) had not previously possessed" ⁵, is an understatement. Although highly elastic, Paramountcy is not so generic as to mean "a right to take whatever measures the Crown thinks fit". It is not "like equity of the early days, ... a roguish thing." ⁶ The view that "The doctrine of Paramountcy may in very general terms be said to be the taking of action by the British authority for the

1. Varadachari, *The Indian States in the Federation*; p. 23.

2. Haksar, *The Indian States and the Federation*, p. 11;

3. Panikkar, *The Indian States and the Government of India*, p. 49;

4. Joshi, *op. cit.*, p 47;

5. Butler Committee Report, para. 18;

6. Sen, *op. cit.* 151.

common weal”¹ is too general to be acceptable. Such views emphasise the political omnipotence of the Crown without sufficient reference to the legal relationship which existed. “Paramountcy” is the outcome of historical facts” and “a theory has been evolved to rest it on a legal basis. This theory which recognises and legalises the existing relationship is characterised as Paramountcy.”² Although in its plenitude it hardly resembled any rule of right, it is not, on that account alone, correct to treat it as always arbitrary or capricious in character. In the very act of violating the so-called legal rights of the Princes, the Crown seems to have nominally recognised their existence, claiming its superior powers to override them. In conclusion, we may say that Paramountcy means and includes a system, a method, a doctrine, a status, a relationship, an attribute, and a complex of rights and duties. It is a singular concept. It may defy definition, but not understanding. It emerged by a sure and subtle process. As it gained ground, it began to expand and encroach upon the powers of the Princes. In course of time it extended its jurisdiction beyond its original bounds. This aspect will be discussed in the next chapter.

1. Montmorency, *op. cit.* p. 5.

2. Joshi, *ibid.* p. 40.

CHAPTER III

Extent of Paramountcy.

In the absence of a precise definition of the term it is not easy to determine its extent. "It is difficult to set sail on the uncharted sea of Paramountcy whose shores can seldom be discerned", observes an explorer. Only a definition can explain the nature of a concept concisely and precisely; it can also both delimit and limit its scope. Such remarks as "to which no limits are set is unlimited"¹ only obscure the problem. Does Paramountcy embrace the entire field of relations between the Crown and the States or is it merely an aggregate of ascertainable powers and obligations? Are the rights comprised in Paramountcy conformable to any uniform type or standard? Who can determine the extent of Paramountcy and how? These questions need solution.

At first Paramountcy was confined to certain specific rights which accrued to the Crown directly or indirectly, as Paramount Power, in addition to what it had derived from treaties. That there was, apart from these, any inherent right in the Crown over the Indian States, was not asserted prior to 1858 when there was a declaration of its *real* suzerainty. The Queen assured the Princes that their rights would be respected; but there had already begun the process of extension of Paramountcy at the expense of the latter. Dodwell's remarks are quite pertinent: "Besides the rights vested by treaty in the Company, there had arisen under the sanctions of superior power on the one hand and reluctant acquiescence on the other, a body of precedents relating to successions and interference in the internal administration of the States. Together, these constituted the Company's Paramountcy, undefined, indifinable, but always tending to expand under the strong pressure of political circumstances. The Princes had become *de facto* dependants, though possessing treaties which recognised them as *de jure* sovereigns."³

1. Ranbir Singh, *The Indian States*, P. 193;

2. Westlake, *op. cit.*;

3. Raghubir Singh, *The Indian States and the New Regime*, p.31;

Lord Minto's pronouncement on Paramountcy reads more like an enumeration of its contents than like a definition of its extent. He spoke of certain all-India matters such as "railways, telegraphs and other services of an imperial character"¹ as coming under the Crown's Paramountcy. This is a most extensive interpretation of the term. Yet it may be accepted as a satisfactory and liberal exposition of the range of Paramountcy. It is different from the vague assertions of imperial authority which we find in the dicta of Curzon. By the end of the nineteenth century Paramountcy had ceased to be a legal right; it had become a political gospel.

Is Paramountcy so extensive as all that? "It is not conceivable that the Paramount Power should.....declare baldly that whatever is, is right."² Though it covers a wide field, its confines are not unascertainable. If in practice it has shown itself as unlimited, it does not necessarily follow that it is theoretically illimitable. But so long as the Crown itself could determine its confines, it means that no external power could set limits to it. Yet the Crown has many a time respected certain principles as regulative of its policy towards the States. Were it not so, its Paramountcy would have shaded into sovereignty. The claim that "The Paramountcy that has fallen on the British is absolute Paramountcy"³ cannot be sustained; it is not so wide as to include whatever rights a superior State exercises. At the same time one should not take too restricted a view of Paramountcy. It is argued, "The true view of Paramountcy is that it is only a complex of rights and obligations differing with each State which flow from the treaty with that State.....It does not and cannot mean that the right of Paramountcy is a discretionary right accruing from all the treaties. It is a varying fact with each State."⁴ Similarly it has been said "The Paramountcy of the Crown depends wholly on cessions.....and.....it extends only to foreign relations

1. Butler Report, Para 29.

2. Julian Palmer, *op. cit.*, p. 163.

3. Macmunn, *op. cit.*, p. 163;

4. Panikkar, *The Indian States and the Government of India*, p. 37;

and external and internal security." ³ Panikkar's is just one view but not "the true view." Paramountcy is not so circumscribed as to depend on treaties only; nor is it so variable and fluctuating as to differ in its incidence from State to State. It lies beyond the frontiers of agreement. It is neither co-extensive with sovereignty nor so restricted as to comprise treaty terms only. It is true, the Indian States possess certain contractual rights. They mainly relate to economic or commercial matters, such as maritime customs, excise duties, opium trade, control of some commodities like petrol, tariffs, mints, and so on. In these cases covenants exist and no question of Paramountcy normally arises. There are some documents which govern the relationship between the Crown and the States. These are mis-called treaties. For instance the Mysore Rendition Instrument of 1881 cannot be described as an agreement. Such documents disclose the vast extent of Paramountcy. Part of Paramountcy rests on treaties, the rest on other foundations.

Paramountcy being a hotchpotch of military, political, legal, imperial, and commercial elements, its area cannot be accurately gauged. On this account we should not conclude that whatever the Paramount Power does, perforce pertains to Paramountcy. *De facto* exercise of power is not a conclusive proof of a *de jure* possession of it. Apart from theory, "The Paramount Power in actual practice takes upon itself to perform functions in relation to Indian States which involve varying degrees of control over their internal government, from mere advice upon the spontaneous request of a State, through the stage of unsolicited advice which the State is expected to follow, right up to the stage of complete control of the whole administration of the State."¹ As the Indian States are inchoate political entities it was essential that their juristic personality had to be complemented by the Crown. This it did by its exercising a right of residuary jurisdiction and intervention. "To the extraordinary power of the Government of India to interfere and set right

1. Holdsworth, *op. cit.*

2. Rushbrook Williams, *The British Crown and the Indian States*, p. 173;

any grievous wrong; no limit can be fixed. The so-called extraordinary jurisdiction rests upon an Act of State and defies jural analysis." ¹

Paramountcy seems to have developed like certain concepts under the active influence of some sort of a legal fiction. It grew and adjusted itself to its contemporary conditions in a manner which would furnish yet another illustration to Maine's theory of operation of legal fictions in the history of institutions. A *ficto juris* is "any assumption that conceals.....the fact that a rule of law has undergone alteration.....The law has been wholly changed, the fiction is that it remains what it was.....It is an instrumentality which brings law into harmony with society."² Often fictions are invented or invoked in law to discover some title about which evidence is not either available or forthcoming. In equity they are resorted to for the attainment of substantial justice. Easements are sometimes supposed to be founded on lost grants; the common law is judicially presumed to be just a body of customs. Fictions are helpful in explaining or justifying some departure from a static state of affairs. They aid in construing a growing concept; they provide for its further growth also. The Crown has had recourse to some such fiction. It has always regarded the treaties as inviolable; but it has equally violated them. The right of the Crown to do so has to be taken for granted; it is its Paramountcy. A *de jure* doctrine of legal authority, "a theory.....which legalises the existing relationship",³ is evolved to vindicate a *de facto* system. Paramountcy is the product of a fiction—the invention of a theory to suit a changing policy. It has had a course comparable to English case-law. Pollock was right when he warned: "It would be rash to suppose that the age of legal fictions is wholly past."⁴

The edifice of Paramountcy reared by the British appears to have had its foundations laid on the doctrine *quod fieri non debet*

1. Lee-Warner, *The Native States of India*, p. 330
2. Maine *Ancient Law* pp. 31-32 (Pollock's ed.);
3. Joshi, *op. cit.*, p. 40;
4. Maine, *ibid.*

factum valet, that is, what should not be done, yet being done, is valid. Time and again irregularities have been committed, inadvertently or designedly. In the beginning none seems to have been punctilious about how Paramountcy was exercised and what its extent was. As Sir George Campbell put it, "there is no uniform system and it is impossible to give any definite explanation of what things we do and what we do not."¹ But it is not so uncertain as all that. Attempts have been made to collect and select data for codification of political practice. But these are to be culled from what the Butler Committee called "some of the incidents and illustrations of Paramountcy". One has to work back from these 'incidents and illustrations' from which the principles of Paramountcy issue. But formulation of a few principles abstracted from stray cases does not provide any yardstick to measure the magnitude of Paramountcy.

The extent of Paramountcy may be considered under (a) General rights vested in the Crown, and (b) Special rights derived from particular treaties or other agreements. The former are "those rights and obligations binding on one hand, the Paramount Power and on the other hand, *every* Indian State".² The latter "form the complex of rights and obligations ... that subsist between the Paramount Power and *particular* Indian States".³ The distinction between the two has lost much importance owing to the *special* treaty-rights of the Princes having been more ignored than respected. The treaties naturally suffered a "process of attrition ... aided by the methods and practice of a powerful bureaucracy of diplomats ... The general tendency has been to force the States into a procrustean bed of political practice, irrespective of their treaty position."⁴ The result was that "political practice had reduced all the States to conform to a single type,"⁵ The special rights available over certain States began to

1. Lee-Warner, *Protected Princes*, p. 272;

2. & 3. Julian Palmer, *ob. cit.*, p. 49 & 54.;

4. Barton, *op. cit.*; ch. xiii;

5. Sastry, K. R. R., *Indian States*, p. 25.

assume the form of general rights. For example the restrictions on Mysore under the Instrument of 1881 were applied in the case of other States also. It is not possible to enumerate the special rights still respected; they are recited in treaties which have lost much of their vitality. In a later chapter¹ some of the principal general rights will be discussed. Certain rights flow from these general and special rights. They may be regarded as resultant rights.

Over and above the special, general, and their resultant rights, the Crown has its own discretionary power. It is one of the most important bases of Paramountcy. It is not possible to measure its extent. There are many instances which show how Paramountcy could invade even the private life of the Princes. Their sacred Palaces were not exempt from the intrusion of the Paramount Power. "The family affairs of the houses of the native Rulers made the Resident's duties sometimes delicate and even domestic"², says an author. When a settlement of the personal squabbles of the Princes was necessary for the well-being of the State, such unpleasant courses had to be resorted to. But the Crown would not gratuitously extend its jurisdiction into the private life of the Princes; it would act discreetly. Thus Paramountcy may be considered as co-extensive with the sum total of general, special, and prerogative rights vested in the Crown. This does not however mean that it was omnicoipotent, comprehending every right exercised. Prerogative itself is not a wholly vague concept. Though its basis is discretionary, its extent is determinable. Paramountcy was more in evidence in non-jurisdictional or semi-jurisdictional States than in the larger ones.

In trying to ascertain the extent of Paramountcy, the orthodox threefold division of State authority proves helpful. In theory all the States, big or small, "enjoy and exercise their authority unrestricted in any manner. Attempts have no doubt been

1. Exercise of Paramountcy.

2. Ruthraswamy, *British Administrative System*, p. 489.

occasionally made to encroach upon the legislative authority of the States."¹ says Sen. In one important case the legislative freedom of a major State was curtailed. At the time of the Rendition of Mysore, a condition was set forth in the Instrument. It was to the effect that the Government was to maintain and efficiently administer "all laws in force and rules having the force of law" and that it could not "repeal or modify such laws or pass any laws or rules inconsistent therewith."² How did this authority to restrict the autonomy of an Indian State come about? It was not under the Foreign Jurisdiction Act which was passed nine years later. It was not based on any agreement, for the Instrument is a unilateral document. It was just an extension of Paramountcy. The principle underlying this was applied to other States also. In the sphere of executive administration the States could not remain unaffected by the Crown's Paramountcy. It was most in evidence in the form of intervention. The statement that "In general, however, all the Protected States exercise their executive authority unrestricted in any manner"³ appears to be far from truth. "The acts of the Suzerain Government are for the most part executive; but in special matters it legislates; and on certain occasions it assumes the role of a judge"⁴ When and how legislative and judicial functions were performed by the Paramount Power cannot be discussed at this stage. The executive authority of the Government of India was so wide as to enable it to exercise legislative and judicial powers indirectly. It is said, "The Governor-General in Council exercises certain legislative powers with respect to the native States, but in his executive capacity and not through his legislative council."⁵ There are instances which show how the Paramount Power discharged judicial duties supplanting the jurisdiction of the State tribunals. It is rightly said, "There is, in point of fact, no part of a State's life

1. *Indian States*, p. 67;

2. Aitchison, *Treaties etc.*, ix, p. 250;

3. Sen, *ibid.*

4. Gundappa, *The States and their People in the Indian Constitution* p. 21;

5. Ilbert, *Government of India*, p. 145.

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which is not touched by the hands of the Suzerain."¹ Yet, in the eye of law, Paramountcy is neither omnipresent nor omnipotent. But to speak of it as limited to agreed affairs only, is to belie its very nature and belittle its real extent. To say "Paramountcy is contractual in nature and denotes.....a definite relationship between them (the States) and the Crown,"² is not wholly correct. No doubt Paramountcy is not sovereignty; but it controlled sovereignties and can be called super-sovereignty. Again the remark of the same writer, "It is no mythical monster suddenly appearing," has no point. None claims any mythical origin for Paramountcy, nor does one hold that it emerged suddenly. It is accepted by all that it is a child of history and grew steadily.

Was the Crown, as Paramount Power, subject to any constitutional control? There can be no controversy about the proposition that the Crown, as executive head of the State, possesses only such rights as are either delegated to it or are not withdrawn from it. The absolute legal supremacy of the British Parliament is axiomatic. The Crown is one of its organs; but it is the least effective. Its prerogatives are exercisable only during the pleasure of Parliament which can divest the Crown of the last vestiges of authority. It was in its imperial capacity as much subject to Parliament as in its domestic capacity, as the Royal head of the realm. If primarily Parliamentary legislation is territorial, it does not follow that it cannot be extra-territorial. "Parliament does not (not cannot) legislate for other territories within the Empire except on matters which are clearly imperial in their nature."³ What else was Paramountcy if not an imperial matter? It was part of the Crown's prerogative not exempt from Parliamentary control.

Palmer argues that "The Paramount Power as such is not subordinate to Parliament"; but he admits that "the enjoyment of the rights of that power by the Crown, may have to be the

1. Gundappa, *op. cit.*, p. 23;

2. Varadarajan, *The Indian States and Federation*, p. 258;

3. Ilbert, *op. cit.*, p. 145.

subject of Parliamentary legislation." He continues, "Parliament cannot legislate in constitutional matters any more than in other respects for the Indian States, ... It is debarred from it by a law outside its sphere and control altogether, namely, the constitutional law regulating the Paramount Power."¹ Control of Paramountcy need not have been through normal legislation. Which is that law "outside its (Parliament's) sphere of control"? "The Indian States are subjects of the British Crown. Though they are beyond the reach of the legislature of British India, they are not beyond the reach of the legislature of Britain itself, which is the supreme law-making body of the Empire."² If it is conceded that Parliament had legislative hold over the Indian States, it follows that Paramountcy lay within the range of Parliamentary authority.

Palmer seems to have considered only one aspect of the British Parliament. As a legislative body its jurisdiction extends to the territories over which it exercises sovereignty. The Indian States were not within British territory and were thus excluded from Parliament's normal orbit. But the Crown, as Paramount Power, cannot, on this score, be regarded as unamenable to the legal supremacy of Parliament. The counsel for the Princes admitted that the contract (between the Princes and the Crown), was with the Crown as "head of the executive government of the United Kingdom under the constitutional control of the British Parliament." The British Parliament is both a legislative body as well as a constituent assembly. Palmer himself supports the constitutional law theory of Paramountcy. To suggest that this law lay outside the area of Parliamentary control is to deny to Parliament its acknowledged constitutional primacy over the component parts of the Empire save the self-governing Dominions.

To hold that the Indian States were in no way subject to Parliament is to overstress the jurisdictional immunities enjoyed by them. When sovereignty itself was under Parliamentary control.

1. Palmer, *op. cit.*

2. Gundappa, *op. cit.*, p.26;

Paramountcy, an authority inferior to it, must, necessarily have been regulable by Parliament. If Palmer's proposition is accepted, *Paramountcy* would become a system constitutionally superior to sovereignty, transcending the supremacy of Parliament. Such a position would be least acceptable to Palmer and others of his kidney.

On the hypothesis that Parliament could not legislate for the Indian States, Palmer proceeds to say "Any subordination to British India would be subordination to Parliament ... It is not legitimate to act in regard to the Indian States from what have been called imperial or all-India considerations. In constitutional law there is no such thing as "all-India."¹ It is one thing to say that the Indian States were not under the Government of India; but to go to the length of regarding them as not having been subject to Parliament, passes comprehension. To argue that there is no 'all-India' in constitutional law is to cut at the very root of Paramountcy which thrive on 'all-India or imperial' grounds. Westlake's remarks serve as a suitable reply to Palmer: "The Empire of India as a term of State-law must be understood in its widest sense. It comprises the whole peninsula."² Two conclusions can be drawn: Paramountcy was subject to the control of Parliament; and it could operate in the interests of all-India. As Paramountcy has all along been a highly elastic term, its attributes multiplex, its extent correspondingly large, it must be interpreted liberally. When a concept signifies a system, a doctrine, a relationship, a method, a status, and a complex of many duties and rights, it is natural that it should cover an area almost unbounded.

1. Palmer, *op. cit.* p. 80

2. Westlake, *op. cit.*, p. 42.

CHAPTER IV

Legal Theories of Paramountcy.

Paramountcy is like a 'dome of many-coloured glass' and its facets and tints have impressed diverse schools of thought differently. It was not designed and executed on the basis of any preconceived plan. "It was shaped by *circumstances and policy*, which is the mixture of history, theory and modern fact."¹ The 'theory' means the legal basis of the institution; 'modern fact' means the actual practice which prevailed.

As the relationship between the Crown and the States was thus determined mostly by considerations of expediency, it may look far-fetched to seek to explain it in terms of law. Legal theory has played little part in it. It has often been employed not for its intrinsic worth, but for reasons of diplomacy. No where does one come across any prior enunciation or declaration of the juristic implications of Paramountcy. Its rights were first administered and then pronouncements followed. Occasionally they were simultaneous. Therefore, its underlying principles have to be deduced from the actual instances of its exercise over a period of a century and a quarter. Political thinkers, jurists, and publicists have propounded their own theories. There can be no finality about any of these; they are after all pragmatic. However, they are highly useful as they disclose the manifold aspects of the concept. The opinions of all these various writers cannot be described as theories; they are just in the nature of views. But as some of them have enjoyed a certain vogue, they may be called theories.

It is difficult to classify the theories with any accuracy. For purposes of convenience they may be divided into two groups. The views of the Princes and their supporters may be regarded as 'legal'. This does not mean that their claims were always either lawful or legitimate. It is to be understood that the Princes put

1. Butler Committee Report, para 19.

forth their claims on grounds which belong to the realm of law. Their arguments contain more legal sophistry than sound law, and therefore their case has stood on precarious ground. Lee-Warner's remarks are quite pertinent: "To some extent the absence of any definite.....law must be regarded as depriving the States united to the Indian Empire of the safeguard which all law or system provides."¹ The opinions of others may be considered collectively. They are either nationalist or imperialist; and the doctrines postulated may be called political or imperial. This clubbing together of nationalist and imperialist writers should not be mistaken. Through they form an unnatural combination there is, between them, what may be called the highest common factor, and that is, the non-acceptance of the Princes' legal theories, albeit on grounds not identical. Again it is not to be supposed that the Princes and their satellites are the sole exponents of the legal titles of Paramountcy and that the rest argue on purely political or non-legal grounds. The nationalist writers rely upon law, no less than the Princes. There are more traits in common between the stand taken by the Princes and the Crown, than between that of the former and the nationalist writers. It becomes very hard to compart the theories as they overlap one another considerably. Only the broad and salient features of each are taken as the basis for grouping.

Paramountcy is explained by some in terms of International Law. Counsel for the Princes maintained that "In the analysis of the relationship between the States and the Crown, legal principles must be enunciated and applied The Indian States were originally independent.....Even when they came to transfer to the Crown those rights which constitute Paramountcy, international law still applied to the transfer." But "none of the States ever held international status."³ Sen finds fault with several writers who rely on the Manipur Resolution which laid down that:

1. Lee-Warner, *op. cit.*, p. 394;
2. *Joint Opinion*.
3. Indian States Committee Report, para 39.

the principles of International Law have no bearing upon the relations between the Government of India and the Indian States under the Suzerainty of the Crown "1. Approving of this Resolution, Wheaton opines thus: "It is clear that the native Princes of India have no international status "2 Admitting that "not full sovereign States are imperfect international persons" Oppenheim excludes Indian States from such a qualified international status even. "Indian vassal States of Great Britain have no international relations whatever, either between themselves or with foreign States."3 According to Sen, "Principles of International Law must be held to apply.....where the provisions of the treaties are not applicable."4 He appears to be arguing in a circle. He pleads for the interpretation of the treaties on grounds of International Law and places Paramountcy on an international basis on the strength of such treaties. Both Wheaton and Oppenheim deny any place for the States in Public International Law. The former holds, "In regard to matters falling within the sphere of private international jurisprudence, these native States are considered separate political communities. "

Panikkar brings in a special Indian International or Public Law. He confidently affirms, "Indubitably it is an International Law in the sense that it is the regulation of relations based on comity, agreement and usage ... although the principles of International Law as understood in Europe between absolutely independent States are not applicable to Indian conditions."5 The second clause so largely modifies the first as to leave little substance in the proposition. True, International Law is essentially non-imperative; but to say that it is understood in Europe as governing "absolutely independent States" is not fully correct. Further, it is to European and American jurists that one has to look, to find out the true nature of modern.

1. Sen, *op. cit.* p. 38;
2. *International Law*, Vol. i, p. 105;
3. *International Law*, vol. i, p. 165;
4. Sen, *ibid*;
5. *Interstatal Law*, p. 6.

international law. "An Indian International Law" is a paradox, to say the least. Another spokesman of the same type says, "It may be that all the attributes according to international law were not possessed by the States The successful rebellion of these States from the respective supremacies was recognised by the Company by entering into separate treaties instead of dealing with the alleged masters Their independent status has been recognised by the treaties In any case some principles of international law may indirectly be invoked for analogy in suitable cases."¹ A slight examination of these statements shows how fallacious they are. In the first there is a qualified admission that the States do not possess international status. The second speaks of "successful rebellion" against the "alleged masters", whereas history bears testimony to the rescue of some States from their real suzerains. A few were actually created or re-created. The last sentence begins apologetically — 'in any case' — and pleads for 'indirectly invoking' some principles of international law for 'analogy in suitable cases for settling disputes.' There is no force in these condition-burdened arguments

Phillimore is cited in and out of season by the protagonists of the international law theory. He refers to "the principles of international justice" as "binding...upon Great Britain in her intercourse with the native powers of India."² but they are different from the rules of international law. The test suggested by him regarding the claims to international existence is conveniently forgotten. It is "the capacity of the State to negotiate, to make peace or war with other States irrespectively of the will of the Protector of the State."³ Would any one credit the Indian States with that capacity? Again much reliance is placed on Pollock's dictum "In case of doubtful interpretation the analogy of international law might be found useful and

1. V. R. S. Aiyer, *The Indian Constitution*, p. 30;

2. Phillimore, *Commentaries on International Law* Sec. 29;

3. *ibid.*, sec. 75;

persuasive." ¹ This reads like a recommendation for occasional application of some principles of international law in the absence of any other, and that too on the treacherous ground of analogy.

A few writers concede to the States a quasi-international status. "The precise category to be assigned to the Indian States in international law is to the academic lawyer as fascinating as it is baffling.....The body of law applicable to them can at best be spoken of only as quasi-international" ² But the evidence against the international law theory of Paramountcy is overwhelming in quantity and superior in probative value. Westlake says, "The native Princes who acknowledge the Imperial Majesty of the United Kingdom have no international existence." ³ Birkenhead expresses a similar opinion: "In theory independent, the States are in fact subject to an ultimate jurisdiction on the part of the British Crown, and for all practical purposes, part of the British Empire, and therefore, not within the purview of international law." ⁴ Keith's statement about the position of the States looks conclusive: "Their relations with the Crown are not those of international law, and rebellion against the Crown is treason, not an act of war.....It is clear that the British Crown has succeeded to the Paramount Power over India once possessed *de jure* and *de facto* by the Mughal Emperors, then acquired *de facto* by the East India Company, and finally assured to the Company, *de jure* by the disappearance of the Emperor." ⁵ The Indian States Committee was justified in its unambiguous declaration that "The Indian States have no international life."

Although Paramountcy cannot be explained in terms of international law, it may be permissible to interpret it in the light of the principles of international justice. Commenting on the celebra-

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1. Pollock, *The Native States of India*, L. O. R. xxvii.
 2. P. S. S. Ayyar, Preface to Mehta's *Lord Hastings and the Indian States*;
 3. *op. cit.*, p. 219;
 4. Smith, *International Law*, p. 38;
 5. *An Introduction to British Constitutional Law*, p. 216;

ted Manipur Resolution, Westlake observes: "It would have been more accurate to speak in it of International Law simply, than of the principles of International Law.....The former would suggest the body of rules and the latter the underlying considerations among which are those of natural justice, which it was certainly not intended to exclude from the grounds of any policy pursued in India."¹ This distinction is very important. It must be appreciated that Phillimore spoke of the principles of international justice (not law) as governing the "dealings of the Christian with the infidel community."²

Panikkar propounds a theory of interstatal law as applicable to the relations between the Indian States and the Crown. This is like a second fiddle. He speaks of the necessity "for a systematic regulation of relations between the States themselves on the one hand and British India on the other" and regards such regulations "comprising of the general body of agreement, usage, and principles, as interstatal law."³ Interstatal law applies to States which possess rights of direct intercommunication. In his letter to the Nizam, Reading wrote, "No Ruler of an Indian State can justifiably claim to negotiate with the British Government on an equal footing." In this context "British Government" stands for the Government of British India. When it has been accepted that the relationship between the Crown and the States had been one of Paramountcy and subordination, it cannot reasonably be called interstatal.

It is interesting to examine Panikkar's views on interstatal law. He says: "The difference between international and interstatal law, though important, is not fundamental.....International and interstatal law are fundamentally alike in that both imply a limitation on the absolute sovereignty of the State.....Essentially there is no difference between international law and interstatal law

1. Westlake, *ibid*;

2. *International Law*, Vol. 1, p. 23.

3. *Interstatal Law*, p. 1;

in India.”¹ These arguments are vulnerable. International law is a law prevailing amongst nations. In the sense that ‘nations’ and ‘states’ are generally convertible terms, international law may be said to be the same as interstatal law. A people or a nationality achieves nationhood and statehood in its political evolution; international law is not on this account, distinguishable from interstatal law. The membership of international society implies the possession of the status of a State. Nation-States are the units of International Law. According to Panikkar the rules which governed the relation between the Crown and the Princes form interstatal law, or a type of ‘Indian International Law.’ The latter term looks queer; we have either an Indian Law or an International Law. An Indian International Law is a contradiction in terms. The difference between International Law and Interstatal Law properly so called, is neither important nor fundamental. But Panikkar’s meaning of Interstatal Law is rather peculiar and we may submit, erroneous. Interstatal Law deals with “the States’ relations with one another ... intercommunication between the States”² through the Paramount Power. “The States could not cede, sell, exchange or part with their territories to other States.....nor settle interstatal disputes.” This is not what Panikkar calls Interstatal Law. Even Interstatal Law, as defined by him, is fundamentally different from International Law. His attempts to define Interstatal Law in such a way as to put the relationship between the Crown and the States into the picture are more ingenious than cogent. If Interstatal Law is taken in the first and popular sense, it is not much different from International Law; and therefore Paramountcy lies outside its orbit. If it is taken in the sense in which the Indian States Committee speak of it, it becomes part of Imperial Constitutional Law and is thus essentially different from International Law. In any case it has no independent position in the scheme.

A system of Interstatal Law presupposes the existence of ascertainable rules and principles. Paramountcy is not wholly

1. *Ibid*, p. 3-5.

2. Butler Report, para 49;

comprehensible that way. Paramountcy has been more the product of usage and political practice than of treaties and agreements. The former can hardly be reduced into a law. Paramountcy involves political superiority. Panikkar himself admits that "the machinery and agency of interstatal action are concentrated in a Paramount Power."¹ There is no such corresponding repository of power in International Law. The States had no right of secession from 'interstatal' bonds; the Crown could coerce them. To Panikkar there seems to be little difference between Interstatal and International Law; but the ones just mentioned are not inconsiderable. Because it was held that rules of International Law were inapplicable to the relationship between the States and the Government of India, it does not follow that the latter "in its relations with the States are governed by no principles."² Do these two, namely Interstatal and International Law, exhaust between them all legal principles? The Indian States were mainly dealt with according to the principles of Paramountcy. But because these are foreign to International or Interstatal Law, it would be presumptuous to dismiss them as 'no principles.' Even as in the case of International Law, a distinction can be made between rules of Interstatal Law and principles of interstatal justice. The latter may be applied to Paramountcy!

That Paramountcy was based on contract, is the theory of the Princes. They maintain that it was derived from treaties and other agreements and even when founded on usage, a consensual element was essential for its validity. "The relationship between the Crown and the Indian States.....must be ascertained by legal criteria,... with well recognised legal principles which are applied in ascertaining mutual rights and obligations where no municipal law is applicable... There is no ground for any suggestion that the relationship has passed the realm of law."³ "Consent is essential to every transfer... This is even more true of a transfer to the Crown by any State in a permanent contractual relationship with the Crown by agreeing to (its) Paramountcy.....in return for its protection."⁴ In short

1 & 2. Panikkar, *op. cit.*; *ibid.*; p 9;

3 & 4. *Joint Opinion of Counsel for the Princes*;

the Princes' argument is that their relationship with the Crown is created by agreement. The Butler Committee summarily discarded what they called the "novel theory of Paramountcy agreement unsupported by evidence."¹ According to Sen "the relationship between the Crown and the Indian States is *purely* conventional; it is founded upon agreements between the two contracting parties; modified in certain cases by usage founded upon their consent."² What about political practice which substantially altered the position of the States? Did it rest on consent? Again usage, with reference to Paramountcy, does not imply consent; it has its own distinct meaning in the context.

The advocates of the contractual theory say that "In the case of every State there is a separate set of obligations and a separate economic position. If so, to whom does the theory of Paramountcy contract belong?Principles and theories which are subject to and conditioned by the particular history and engagements of each State do not by themselves apply to any state and are not of much practical utility in any case."³ This contractual theory is regarded as "a variant or extension of the international theory..... This is a specious attempt to gain the advantages (without assuming the liabilities) of international status, while not advancing the untenable claim to a present enjoyment of it."⁴ Even assuming that the States had an independent international status at any time prior to accepting British protection, the position held by them when entering into the various treaties is one which cannot be regarded as independent from the point of view of international law. "With many of them treaties were entered into long ago which if no subsequent change in the relations so established had taken place, would warrant their being looked upon as independent, save in the point of capacity to maintain intercourse

1. *Butler Report*, para. 39;

2. Sen, *op. cit.*, p. 149.

3. Latthe, *Problems of Indian States*, p. 118;

4. Palmer *op. cit.* p. 16;

with any European or Eastern Powers or fellow Indian States.¹ Thus they were not full international persons to be one of the high contracting parties to an agreement.

The treaties are claimed to be both evidence and embodiment of contract. But they are in no instance dealings between equals. The British Government "is everywhere the visibly preponderating power. It has 'invested' the Raja with his sovereignty; it agrees to 'cede' to him his 'territories' which he is to hold in 'subordinate co-operation.'² The tone and content of these treaties reveal hardly any contractual element in the transaction recorded. The contractual theorists seek the aid of both international law and municipal law at one and the same time. The crux of the problem is: Are the relations based on treaties or contracts? "It is incorrect to regard a treaty as an instrument equivalent to a contract. A contract is an agreement formed under the aegis of municipal law; a treaty is an agreement having quite other sanctions."³ It belongs to international law and "concepts of municipal law have to be emptied of much of their force in the sphere of international law."⁴ It has been well pointed out, "In the theory under consideration the two things are confused. A treaty concluded (by this theory) under international law is made to operate only by the principles of municipal law."⁵ The exponents of the contractual theory maintain that the nature of what they term Paramountcy agreement must be determined by the analysis of individual instruments. What about rights which transcend such agreements? A wide discretionary power constitutes the very stuff of Paramountcy "which has not always to rest upon treaties."⁶

According to some, Paramountcy is an authority derived by the Crown from the Princes. "The Paramountcy of the Crown depends

1. Hall, *Foreign Jurisdiction of the British Crown* p. 206;

2. John Malcolm Ludlow, *Thoughts on the Policy of the Crown* p. 30.

3, 4, & 5. Palmer, *op. cit.*, pp. 18-19.

6. Lee-Warner, *The Native States of India*, p. xi.

wholly on the cessions of their rights which all the States have made or must be assumed to have made." ¹ What an assumption! This theory closely resembles the next preceding one. It was thus urged by the Princes' counsel: "The Crown is aptly described as the Paramount Power, because the States have agreed to cede to it certain attributes of their sovereignty, and Paramountcy is a useful word to describe the rights and obligations of the Crown, which arise out of the agreed cession of those attributes of sovereignty." ² It is historically inaccurate and legally unsound to treat the Crown as a donee of powers constituting its Paramountcy. To say that "As each State came under British protection, it invested the Crown with Paramountcy surrendering to it some of its sovereign powers, the measure of sovereignty depending upon the political exigencies of the moment" ³ is to indulge in euphemism. 'Invested the Crown with Paramountcy' is an astounding argument. No doubt there are some treaties purporting to confer specific powers on the Crown. The grant of extra-territorial jurisdiction to the Crown in respect of the trial of European British subjects resident in Hyderabad, by means of a *Sanad* in 1861, is an instance and illustration of the theory. But one swallow does not make a summer. There is no point in the proposition, "The so-called Paramountcy of the Crown consists of those rights and powers, those fractions of sovereignty, which the Indian States have consented to surrender to the Crown." ⁴ The existence of a few treaties supporting the 'theory of cession of Paramountcy rights, does not warrant the questioning of the very Paramountcy of the Crown by referring to it as 'the so-called' Paramountcy. The so-called cessions are more surrenders than grants. One of the Princes' principal spokesmen says: "States like Baroda, Udaipur, Alwar, Nawanagar or Tripura existed as already full-powered States when they first accepted British Paramountcy. Their sovereignty was their own, not granted to them by the British. Indeed they were

1. Holdsworth, *op. cit.*,
2. *Joint Opinion*;
3. Varadarajan, *op. cit.*, p. 258;
4. Sen, *op. cit.*, p. 156.

the donors and the Crown the donee; for Paramountcy was created by their cession of certain sovereign rights to the Crown." ¹ It is one thing to say that these States were sovereign. But what is the logic behind the conclusion that the Crown was the donee of Paramountcy powers?The following observation is equally fallacious: "The gist of all the treaties is that the States transferred to the Crown powers.....The States were the grantors and the Crown the grantee." ² In fact the treaties most eloquently proclaim the compulsory acquisition and not any voluntary cession of powers constituting Paramountcy.

If there were full-powered States which are reputed to have been the authors of the Crown's Paramountcy, what about a host of States not 'full-powered'? Some of them were actually created by the Crown; many received both their status and powers from it. In answer to the Princes' claim that they were the grantors of Paramountcy powers, the case of Mysore has been alluded to with the remark "Paramountcy creates a State" ³ Wellesley's Letter is self-explanatory. It runs thus: "It is almost superfluous to state, that the whole kingdom of Mysore ...fallen to the army of the company... is at present to be considered part of their dominions by right of conquest; we shall rest the whole settlement upon the basis of our conquest and render our cession the source of the Raja's dominion." ⁴ It is from the Paramount Power that some States have derived their powers. The Crown has acquired authority from sources other than grants or cessions. It is erroneous to say, "Paramountcy is a delegation of authority by the Indian States to the Crown." ⁵ It has been correctly said that "sovereign rights may grow up in, or inhere in, an authority without having been ceded or transferred by anybody." ⁶ What happened in India is exactly the same.

1. Rushbrook Williams, *op. cit.*, p. 80;

2. Varadarajan, *ibid.*, p. 257;

3. Varadachariar, *op. cit.*, p. 51.

4. Mysore State Papers, ii, p. 43;

5. Panikkar, *Interstate Law*, p. 7;

6. Palmer, *op. cit.*, p. 21;

Paramountcy finds no place in Constitutional Law properly so called. It is "a sub-division of Public Law. It has two main purposes; first, to fix the distribution of political authority among the various institutions which together make up that complex organisation known as the State; second, to define the rights and duties of each against or towards the citizen and the alien within the territory of its operation."¹ It is also defined as that which "consists of all rules which directly or indirectly effect the distribution or exercise of sovereign powers of a state."² But no such 'distribution of political authority' or 'exercise of sovereign powers' are involved in Paramountcy. "Whatever authority is exercised over them (the States) by the Crown, is exercised by way of diplomacy only, and not by way of constitutional law."³ Constitutional Law includes rules "which prescribe the distribution, or regulate the exercise of the sovereign authority in the State, define the obligations of the subjects towards the State, and lay down the rights which the State permits its subjects to assert even against itself."⁴ But the States were not British territory; their governments were not limbs of British administration nor were the Princes, British subjects. "Those who advance the constitutional theory may find in the Raja of Benares or of Pudukotah, germs of an idea that the chiefs were rather petty nobles of the British dominion than sovereigns of petty States. But the uniform tendency of British administration has been to exalt the status of the Indian chiefs, and to keep their territories outside the grasp of British law."⁵ It would be inaccurate to call them hereditary nobles subject to Constitutional Law in the strict sense of the term.

To consider the relationship between the Crown and the States as federal or even semi-federal, is to read something in Paramountcy which is quite extraneous to it. The States were not constituent

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1. Jenks, *The New Jurisprudence*, p. 243;
 2. Dicey, *Law of the Constitution*, p. 23;
 3. Salmond, *Jurisprudence*, p. 515;
 4. Keith, *The Governments of the British Empire*, p. 4;
 5. Lee-Warner, *op. cit.*, p. 372.

units of a composite polity. Citing with approval the views of Sir Frederic Whyte,¹ Chudgar seeks to find a resemblance between Paramountcy and federal relationship. He says: "As 'India' means not only British India but also the whole territory of the Indian States ... the Government of India possesses Paramountcy powers comparable to those of a federal Government, over the foreign relations of the States, over their armaments, over succession security behaviour of any State, its government and conduct within or without its borders."² This is a most superficial and misleading similarity. Federal relations are characteristically constitutional and involve delimitation of jurisdictions, division of functions and both separation and distribution of powers. Acts of the federal centre as well as of the federating units are justiciable. The member State of a federation cannot be compelled to do anything which is not expected of it constitutionally. This has not been the case with the Indian States. "Unlike the American States, the Indian States can be coerced and the Paramount Power can interfere with individual citizens or individual States."³ As observed by Sir Tej Bahadur Sapru, "The question of Paramountcy in relation to the Crown is one thing and in relation to the federation is quite a different thing. There can be no such thing under a federal constitution as one Paramount unit of federation exercising Paramountcy over another unit of the federation. The basis of federation is equality."⁴ Conversely, there can be no federal relationship under Paramountcy. The basis of Paramountcy is inequality.

The mere fact that the States are separate political entities does not mean that their relations with the Paramount Power are akin to the constitutional nexus between the various units and the

1. *India—A Federation*

2. Chudgar, *Indian Princes under British Protection*, p. 155 ;

3. *Per Bhulabhai Desai*, Preface to Krishnamurthy's *Indian States and the Federal Plan*;

4. Speech at the concluding session of the Federal Structure Committee.

centre in a federation. It is not correct to describe the Indian States "as autonomous units (in the sense of entities of a federal polity) and to maintain that "The Government cannot intervene unless conditions at present undefined, but well understood, are satisfied."¹ The test of any federal state is the existence of a supreme judiciary which acts as the guardian of the constitution. To presume that there was a federal or semi-federal relationship between the States and the Government of India and then to complain that there was no such judicial authority, looks literally preposterous. It has been said: "The one great shortcoming of this semi-federal system of government in India is that there is no such independent judicial machinery to adjudicate upon the interstatal rights and to prevent the invasion by the Central Government in the domain of State sovereignty. At the present time all questions of this nature are decided by the Government of India by virtue of its claims to Paramountcy."² This was properly so. It is wrong to describe the Government of India as a semi-federal system. The absence of a judicial machinery is not a 'shortcoming' merely. A supreme judicial body is the *sine qua non* of federation. The Central Government is not a federal authority; it is the Paramount Power. Reluctantly, the two champions of the Princes admit that the relations between the States and the Government of India were not federal; but they over-qualify their admission. They say: "The apparent exclusion of the States from the central authority imparts to the constitution of the Indian Empire the semblance of unitary government The Government of India ... has never in principle denied the right of States to express themselves upon questions which concern them."³ What are the facts? The States were *really* excluded from the central authority; the Government of India has all along been unitary, both in form as well as in substance. The non-denial, in principle, of the right of States to have some say, does not mean that there was a large semi-federal element in the polity.

1. Haksar and Panikkar. *Federal India*, p. 36;

2. *ibid.*, p. 94;

3. *ibid.*, p. 34.

LEGAL THEORIES OF PARAMOUNTCY

Is Paramountcy a kind of trust? To say that the position of the Crown was a fiduciary one is all right; but to go further and treat Paramountcy as a sort of a trust is not permissible. Many a time the Paramount Power has acknowledged that its authority carried with it a moral responsibility. As Lord Minto put it, "The Imperial Government have assumed a certain degree of responsibility for the general soundness of their (States') administration."¹ Curzon's admonitions and exhortations to the Princes clearly indicate the fiduciary nature of Paramountcy. His expostulating with the Princes on their duties towards their subjects is well known. His advice that 'the *gaddi* is not intended to be a *divan*' of indulgence, but the stern seat of duty"² shows how solicitous the Paramount Power professed to be about the welfare of the States' subjects. But this would not make it a trustee.

The East India Company was ruling its territorial possessions as a "trustee for the Crown".³ According to a Resolution,⁴ the Government of India described themselves "trustees and custodians of the rights, interests, and traditions of native States, during a minority administration." But do such statements cover all the aspects of Paramountcy? According to the first statement, the Crown was a beneficiary. The second one applies only to minority administrations. What happened to the trusteeship when the Crown assumed the direct governance of India? The Company was, till then, its trustee. When the Crown took over the administration of India was there no termination of the old trust?

In a statement to the Press Dr. Ambedkar characterised Paramountcy as a trust. He said: "The powers of Paramountcy are of the nature of a trust held by the Crown for the benefit of the people of India."⁵ 'The people of India' have unfortunately, no where been described or much less treated, as beneficiaries. This is

1. Minto's Udaipur Speech;
2. Curzon's Jaipur Speech;
3. 3 & 4 William IV, cap. lxxxv,
4. No. 1894-1A, 27-8-1927 ;
5. Times of India, 19-6-1947.

a matter of Indian political history. There is no denial of the fact that the Paramount Power has exercised its authority in the interests of India as a whole; but this does not convert Paramountcy into a trust. Dr. Ambedkar's statement is all right as indicating a general fiduciary responsibility involved in Paramountcy. But the analogy cannot be pressed further. The subjects of States or of India as a whole have not been recognised as beneficiaries, for one to treat Paramountcy as a trust in their favour. Just because the word 'trusteeship' is employed, it does not follow that all the ingredients of a trust must perforce exist. Shah argues that "The doctrine of Parliamentary trusteeship over India was specifically mentioned in the Preamble to the Government of India Act, 1919,". He adds: "By the theory of this trust, by the fundamental principles of all trusts, the trust is valid only upto the day the legal incapacity or disability of the beneficiary is ended"¹ But who was the beneficiary? In the present context the Preamble alluded to does not create or evidence any trust; and the question of its termination does not arise. The Paramount Power was not an equitable guardian either. As Gundappa would say, "Viewed legally and with reference to her generally acknowledged rights she is a great deal more than a simple disinterested guardian". He continues, "The synonyms of her Suzerainty are Supremacy, Paramountcy and Imperial Prerogative."² But it is submitted that each of these alleged synonyms is distinguishable from Paramountcy.

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1. Shah, *Federal Structure* p. 49;
 2. Gundappa, *The States etc.*, p. 20.

CHAPTER V

Imperial Doctrines of Paramountcy

At the beginning of the last preceding chapter it was said that the grouping of theories concerning Paramountcy was not based on any strict principles of logic. The motive was convenience. The so-called legal theories contain a lot that is not law and similarly the 'imperial doctrines' of Paramountcy are not totally devoid of legal value. The appellation imperial is given just to indicate that the views advanced are based more on political than on constitutional considerations. The thesis of the Princes has all along been that "The relationship between the Crown and the Princes is wholly legal, a nexus of mutual rights and obligations."¹ On the other hand the Crown and others view the relationship as non-legal and mostly political. The rejection of the Princes' theories is based on different grounds in each case.

There is a school of thought which regards the relationship between the Indian Princes and the Crown as feudal. It was Tupper who "cleverly and elaborately discussed at considerable length, the application to them (the Indian Princes) of the term feudatory, in 'Our Indian Protectorate.'"² Lee-Warner does not subscribe to Tupper's theory. He says: "Parallels to the *droits seigneuriaux*, to *fiefs*, to the *comitatus*, and other incidents of feudalism, can readily be traced in Indian history; but the sources of these common facts differ, and the broad currents of their development took entirely different directions in the East and in the West. Mr. Tupper himself admits that the 'inchoate feudalism of India' lacked three factors.....But it lacked more.....It lacked the vital spirit of European feudalism."³ The Indian Political Department acted on the assumption that the Indian States were merely feudatories of the Crown. This "theory of a kind of feudal Paramountcy came to be

1. Sir Leslie Scott, *Indian States*, 1929, L. Q. R.

2. Lee-Warner, *Protected Princes of India*, p. 376;

elaborated in the time of Lord Mayo." ¹ The constant use of such words like feudatory, vassal, chief, suzerain, lord, 'fealty' and so on lends support to the feudal theory. The Proclamation of Edward VII, cited by Lord Minto in his Udaipur Speech, 1909, begins thus : "To all my Feudatories and subjects." Colonel Malleon calls the Indian Princes "feudatory Chiefs." ² Sir Henry Cotton also calls them "feudatories." ³ Even the leading official expert and Princes' adviser Professor Rushbrook Williams says : "Many of these States owe their very existence to British justice and arms.....these feudatory States chequer-board all India." ⁴ The Indian Princes are not mere feudatories. The feudal theory is no longer respected. Except for a few Chiefs in the Central Provinces and Orissa who have described themselves as 'feudatories' and have executed 'fealty bonds,' the Indian Princes are not officially designated as feudatories or vassals. The loyalty of the Indian Princes to the Crown is not the same as the allegiance of a feudal baron to his liege lord. Between some of the larger States and their tributaries there is something like a feudal tie. The Government of India once ruled that the mere payment of a tribute by a State cannot make it a feudatory. Between a vassal and his Suzerain more than payment of tribute is involved. However, "the word feudatory is a useful one, and as long as it is employed to imply a measure of subordination and general Paramountcy, is permissible." ⁵

But to press the feudal analogy further would be improper. The Rulers of Indian States possess considerable powers of internal sovereignty. They are masters of their own territories; they are not just holders of any feudal fee or tenure under the overlordship of the Crown. They are unlike the mediaeval barons who were rewarded with lands for military services both rendered and to be rendered to the Crown. The Indian Princes being Rulers of States,

1. *The British Crown and the Indian Princes*, p. 102.

2. Malleon, *Native States of India*, p. 7;

3. H. J. S. Cotton, *New India*, p. 7.

4. Brailsford, *Subject India*, p. 65.

5. Sir George Macmurtrei, *The Indian States and Princes*, p. 169.

it would be wrong to regard them as resembling *less lordes anglais*. It has been pointed out that "By the feudal system Barons derived their lands and authority from the King as their feudal superior; whereas by our treaties with the Indian Princes we recognised their inherent right to govern their subjects..... To-day when the States' forces are desired for service in the field, the Government do not call them as would a feudal superior, they ask if the Princes will offer them." The territorial integrity of the Indian States is guaranteed. They constitute foreign territory of which the Princes are rulers, not mere proprietors. Most of the Rulers belong to historic dynasties and rule their lands handed down by their forbears. They govern in their own name, on their own account, and on the strength of their old titles. "The terms used in reference to the native Princes are the technical ones consecrated to our own sovereigns" says an English writer. He continues: "The words are words of sovereignty. No Peer, through he wear the strawberry leaf is entitled to them. A private corporation sole or person has no 'successor'. A private corporation aggregate, such as a public company, has 'assigns.' The King has heirs and successors—'heirs' that is, persons who according to the laws of inheritance can fill the throne left by him; 'successors', that is, persons who can be called to it by some other title not flowing necessarily from himself but from the perpetual individuality of the State which he governs. The terms 'heirs and successors' are used in the Queen's Proclamation." Even Hastings recognised that there were States other than those "professedly feudatory" distinguishable from them as "standing in the denomination of allies."³ According to Sir John Strachey: "The States are often called 'feudatory'; but there is no real analogy between the relations with the Government of India and the incidents of feudal tenure. The expression has come into use as Aitchison says, 'merely from want of a more convenient term to

1. A. P. Nicholson, *Scraps of Paper*, pv, 286-212.

2. Ludlow, *Thoughts on the Policy of the Crown*, p. 30.

3. Palmer, *Sovereignty and Paramountcy*, p. 8.

denote the subordination of territorial sovereignty to a common superior and combined with the obligation to discharge certain duties and render certain services to that superior." ¹

To go back to Tupper who stated that "these native States are the feudatories of which the British Government is suzerain," ² it is to be observed that his theory has not commended itself to many of his successors. In the opinion of Lee-Warner, "Mere feudatories hold an inferior position to junior partners in an imperial scheme." ³ Again, "It is the superficial resemblance confined to a very few of the petty chiefs which makes the employment of the term 'feudatory' so dangerous to the great bulk of the protected Princes of India." ⁴ To regard the Princes as "tenants at will" ⁵ is inaccurate although they owe their existence to the grace and goodwill of the Crown. That "There is no pretence to equality in the feudal relationship" ⁶ is an overstatement.

It has been said that the relations between the Indian States and the Paramount Power were "governed by a special body of rules, *sui generis*, which Lee-Warner (It should be Tupper for Lee-Warner disapproves of the term.⁷) calls Indian Political Law." ⁸ This is indeed a strange phrase. Law and politics are distinct and they can hardly be compounded into an intelligible expression. It is pointed out; "Tupper uses the term 'Indian Political Law' which is open to criticism that there is little legal about the actual practice of the Indian Government itself." ⁹ He was one of the pioneers of Paramountcy. He seems to have tried to invest the diverse practices of the Political Department with a legal character. He was the first exponent of the theory of

1. Strachey, *India*, p. 305.

2. Tupper, *Our Indian Protectorate*, p. 4;

3 & 4. Lee-Warner, *ibid*, p. 394 and xi.

5 & 6. (previous page), Brailsford, *Subject India*, p. 130

7. Lee-Warner, *op cit*. p. 27

8. Julian Palmer, *Sovereignty and Paramountcy*, p. 4.

9. K. R. R. Sastry, *Paramountcy and State-Subjects*, p. 25.

political practice'. According to the early attitude of the Department "No chief" it was said "has a right to misgovern his territory. Minute and frequent interference is prohibited barbarous practices are not tolerated."¹ These precepts are regarded as constituting a sort of a 'political law'. The conventions established by the Department are more the consequences than the causes of Paramountcy. As long as the validity of what the officers of the Indian Political Service did was not open to judicial examination or determination, whatever was done, was legal.

Do the rules of official procedure constitute 'political law'? Palmer asks: "If the relationship between the Indian States and the Paramount Power is governed by the rules of Indian 'Political Law'; what are those rules? They are merely rules collected from practice To say that there are rights between the parties, but that they are, 'political' rights governed by 'Indian Political Law' is merely to describe in an apparently legal phrase a state of affairs in which facts alone have force."² The practice referred to is that of the Political officers whose conduct "may not be tried by any principles of general jurisprudence external to themselves The coin of the name 'Indian Political Law' is constantly appealing to some kind of equity and right to justify the rules he collects from practice; and what it comes to is that the relationship in question is to be governed by rules which are collected from practice and then justified by principles of so-called equity; but these principles may only be imported *ex post facto*, must be brought in piecemeal as required and virtually detached from the general body of jurisprudence as not to be themselves ordered or tested at all."³ That an attempt should have been made to fabricate a theory of 'Political Law' to explain the practice of the Crown in regard to the Indian States shows the real nature of Paramountcy. Does the phrase 'political law' mean that what the Paramount Power did was law to the

1. Julian Palmer, p. p. 5-6.

2. Julian Palmer, *Sovereignty and Paramountcy*, p. 5.

3. *ibid.*, p. 6.

'States ?' Or does it mean that the Paramount Power was bound by certain laws and principles in its dealings with the Indian States? If it is the former, 'Political Law' would be a misnomer. If it is the latter, it is necessary to see whether any principles which guided the Paramount Power in its intercourse with the Indian Princes could be formulated into some 'political law'. It must however be borne in mind that the term law, used in the context, means nothing more than a body of rules actually observed without reference to any formal declaration before hand.

At the outset it was remarked that Paramountcy was more a political power than any legally definable authority. Sastry rightly says that "The basis of this imperial right is essentially political and any effort at reconstructing these legal-cum-political bases will always prove vulnerable." The Indian States' Committee plainly admit that Paramountcy is governed by 'imperial necessity' and "must fulfil its obligations defining or adapting itself, according to the shifting necessities of the time and the progressive development of the States."² That the relationship between the Crown and the States is more to be judged from the point of view of politics than of law, is the view of the Nehru Committee also. They say: "Sir Leslie Scott regards the relationship between the Crown and the Indian States..... as almost a virgin field for a lawyer and we venture to say this is not quite correct. We think it is more a case for the constructive statesman than for the analytical lawyer."³ Scott himself, while championing the claims of the Princes that their relationship with the Crown is wholly legal, admits that "political issues of first rate importance" are involved. He pleads for "a statesmanlike treatment of the Princesfrom an Imperial standpoint."⁴ Another admission is also significant: "The relationship between the Crown and the Indian States is unique It does not fall within the ambit of international law." These passages illustrate

1. K. R. R. Sastry, *Treaties, Engagements and Sannads*, p. 238.
2. Butler Committee Report, para 57.
3. Nehru Committee Report.
4. Law Quarterly Review July 1928; Ch. Indian States,

the true character of the relationship between the Crown and the States. The nexus is mostly political.

If by 'Indian Political Law' is meant that the Paramount Power exercises its political or imperial rights lawfully, there can be no objection to the phrase. It is quite useful as it suggests the dual character of Paramountcy. After all what Paramountcy is, can more adequately be ascertained from political practice than from legal precepts; for "Paramountcy is an omnibus term used to denote the rights which the Crown can exercise through the Political Department of the Government of India over the States."¹ To designate the political rules or maxims as 'law', would not be proper. There has been nothing like a 'code of law' covering, if not governing, political practice. Attempts at codification were made; but they would not, even when accomplished, produce any political 'law'. Does 'Political Law' stand for the rules which the Crown's Indian Political Officials were obliged to obey? So far there has been no such law. There was of course a celebrated code of political practice, namely, Tupper's Manual. But this book was confidentially issued and circulated among the Officers. The book itself is "the sacred mystery of the code of political practice",² a political scripture, so to say, rather than an embodiment of any clear legal principles of Paramountcy, which might have constituted some 'Indian Political Law'.

It is almost universally accepted that Paramountcy has its basis in military protection. As observed by Sir William Barton: "Paramountcy is the outcome of military supremacy over the great sub-continent of India; an inevitable corollary of military protection As far as the Indian States are concerned, the sole object of the alliance was to secure military protection They had unavoidably to cede to the stronger military power the control of their foreign relations ... The outstanding feature of this relationship was the military protectorate."³ With reference to:

1. Ambedkar, *Federation Vs. Freedom*, p. 99;
2. Sir William Barton, *The Princes of India*, Ch. xlii.
3. Barton, *Ibid*.

the prospect of Indian States gaining freedom on India's attainment of dominion status, the same writer, elsewhere, pleads for the fulfilment of obligations involved in the military protectorate. He says : " Political India would not expect the British Government by a unilateral act to place the fate of the Princes in the hands of the Hindu political intelligensia. The Crown must inevitably have some voice in military affairs so as to be able to carry out the obligations of the military protectorate." ¹ This view finds great support from many quarters. Macmunn bluntly puts it : " That whether you like it or whether you do not, it is the meaning of Paramountcy (Lord Reading's dictum of British Supremacy), of Paramountcy backed by the unassailable ' forty-pounder train ' It is the meaning of supremacy all the world over from Stalin to the Holy Father. It is infallible by right of *force majeure* " ² This is truth, though harsh and grating. As early as in 1843, in a minute dated the first of November, Lord Ellenborough spoke of British Paramountcy as the result of arms, and strongly urged for its maintenance " the continuance of our military preponderance " lest the " withdrawal of our restraining hand " should " let loose all the elements of confusion." ³ The various treaties and engagements clearly show how the Paramount Power has taken upon itself the right and obligation of protecting the Princes against attack both from without as well as from within.

It is to be admitted that Paramountcy must be explained essentially in terms of military protection. That it has been derived from military might only, is stressed by Tupper. " The Paramountcy of the British Government is not derived from the law of nations, or from the Moghuls, or indeed from any of the potentates who maintained a fluctuating and often nominal suzerainty over the different parts of the country. It rests on conquest." ⁴ But protection extended to the States was not just limited to military help; it included the protection of the subjects as well against gross misrule.

1. Barton, *India's Fateful Hour*, p. 33;

2. Macmunn, *The Indian States and Princes*, p. 164.

3. *Ibid*, p. 174.

4. Tupper, *Our Indian Protectorate*, p. 60.

Tupper says: "We extend protection to the subjects of native states first as against gross misrule; secondly as against all enemies of the British Government and thirdly, in our ordinary relations with foreign powers."¹ These two passages from Tupper disclose two things; first, Paramountcy is mostly military in origin, and secondly, protection is not restricted to military aid to the Princes. It is also clear that Paramountcy at the beginning was purely military and that later it became something more, if not different. What prevailed at the commencement of an institution does not necessarily or conclusively decide its character permanently. Moreover, not all the States which came under British protection did primarily seek protection. Many a State was at first an ally. It is only after the end of the eighteenth century that there appears a scheme of military protection as distinguished from co-operation.

In a large number of treaties and engagements the Indian States are described as protected principalities. That many of them lost their freedom, and most of them their sovereign status, as price paid for military protection, is well known. Some States have parted with portions of territory, in consideration of the same. But one should not overstress the military character of Paramountcy. It is one thing to say that the Indian States depended for their existence on the strong arm of the Paramount Power, and that in consideration of that protection agreed to provide facilities of every description to the British army, and in pursuance of the same agreement, undertook to maintain armies, pay tributes or cede certain areas in lieu thereof. It is altogether a different thing to say that they were just principalities entitled merely to military protection. The origin of Paramountcy is attributable to military protection. Its subsequent course particularly after 1858, shows that it is not absolutely the right of a military protector. Paramountcy came into existence on account of certain military exigencies. But it slowly acquired a political complexion. To a certain extent it began to assume a constitutional tone as well. What was mere military superiority eventually became a constitutional

1. *Ibid.*, p. 354.

authority. The fact that Paramountcy means an imperial might, and that based on military supremacy, primarily, and a constitutional right next, is self-evident; it cannot be gainsaid. But to speak of Paramountcy in terms of military protection only would be to ignore a sense of proportion. Its scope is much more extensive. It includes a good number of matters other than the duty and privilege of military protection.

There is another doctrine advanced by the Indian Princes that their relationship with the Crown is personal in nature. As observed by Sir Leslie Scott "one would say that the contracts between the Princes and the Crown were personal -- incapable of being performed by any one else. The Princes, in making them, gave their confidence to the British Crown and Nation, and the Crown cannot assign the contracts to any third party."¹ One of the Princes expresses an opinion which has claims to be considered as representative: "The theory of Paramountcy has its basis in a personal relationship between the King-Emperor and the Indian Princes."² That the tie involved in Paramountcy is to a large extent personal is the view of Westlake also. He says that "the Indian Government itself admitted and acted on the existence of a personal tie between the Queen-Empress on the one hand and the native Princes and their subjects on the other hand.....which is the very tie that in political language is described as the relation between sovereign and subject.....Loyalty and allegiance as expressing the duty to the Queen-Empress, treason and rebellion as expressing the breach of that duty, are terms familiar in Indian official language."³ It is significant that Panikkar has at one place indirectly admitted that the relationship between the Crown and the Indian States was impersonal. He says: "Though in many treaties the obligations of the Rulers as individuals is emphasised, there could be no doubt that the treaty made with him is as representing his State."⁴ So much when the question is one of

1. *Law Quarterly Review*, July 1928.

2. Raghbir Singh, *The Indian States and the New Regime*,
p. 35.

3. Westlake, *Collected papers*, p. 221;

4. *Interstatal law*, p. 24.

obligations ; but what about rights ? Personal loyalty of the Indian Princes to His Majesty the King-Emperor was only a part of their obligations to the British Crown. It must be remembered that "Allegiance is not an expression of mere courtesy or friendly sentiment."¹ What the Princes owed to the Crown is something more than personal allegiance. It has been stated that "All chiefs owe obedience to the Paramount Power."² The Princes owed an abiding loyalty to the throne of His Majesty, more than to the person occupying it for the time being.

The Princes have all along received recognition on the ground of being heads of States. In fact, independently of their States they possess no *locus standi* for purposes of their relationship with the Crown as Paramount Power. To claim identity with their States, let alone full sovereignty over the same, in one breath, and to contend that their relationship with Crown is personal, in the same breath, is to reach the height of inconsistency. Sovereignty of the Princes in respect of their States is a 'real' thing ; any relation with the Crown based on that must necessarily be the same. Moreover the British Crown is not a personal being ; it is a constitutional institution. If the Princes' relations with the Crown were purely personal, much of the mischief of Paramountcy could have been obviated. A personal tie cannot perpetually last ; it snaps on the disappearance of any of the persons party to it. What is personal to the Princes and the King-Emperor is of little or no constitutional importance. The British Crown itself has been a 'real' entity. It acted "not in a personal capacity ... but in the capacity of Ruler of British India ... The contention that the sovereign of a country who enters into a treaty does so in his personal capacity and not as the sovereign of the country is too absurd to be maintained in the twentieth century."³

1. Gundappa, *The States and their People*, p. 23 ;

2. Sir T. W. Holderness, *Peoples and Problems of India*, p. 195.

3. P. S. S. Aiyer, *Indian Constitutional Problems* p. 213 ;

It has also been pointed out that "the Indian States owe their subordinate co-operation not to the Crown in his personal or individual capacity, but to His Majesty as the King-Emperor of India,"¹ and that too "in his political aspect." That Paramountcy, partly derived from treaties, is a real relationship, is again obvious from the following: "Treaty rights appertain to a State, not to its head. They are not personal properties."² It is true that in international law "treaties of alliance are of a purely personal character."³ But to hold that such treaties are 'like the Indian treaties' is not correct. There can be no comparison between the two. The personal element involved in Paramountcy is not in any case considerable. Realising the importance, from the point of view of the Empire, of the Princes' claims of personal relationship and the resulting rights and obligations of the Paramount Power, the Indian States Committee clearly stated that "the Princes should not be transferred without their own agreement to a relationship with a new Government in British India responsible to an Indian legislature."⁴ This finding of the Committee is politically intelligible but legally unconvincing.

Holdsworth expounds a doctrine of a 'distinct prerogative'. According to him "Paramountcy is only part of prerogative."⁵ He lays down a dictum that "Prerogative is not the source of Paramountcy" and maintains that "the growth of Paramountcy has added a new and distinct prerogative of the Crown." Holdsworth's arguments need some examination. The three propositions stated by him are the postulates on which two conclusions are based. He says that "the Crown cannot cede its rights and duties as Paramount Power to any other State."⁶ Secondly, he holds that "usage accepted

1. K. R. R. Sastry, *Indian States* p. 22;
2. M. K. Nambyar, *Federal Law Journal*, Oct. 47.
3. Sen, *Indian States*, p. 147;
4. Butler Committee Report, para 58.
5. Law Quarterly Review, xlv "The Indian States and India".
6. Holdsworth, "The Indian States and India," Law Quarterly Review, (1930), Vol. xlv;

by the Princes is the most important basis of Paramountcy, and..... Paramountcy resting upon this basis is a source of a separate part of the Prerogative, no alteration in this usage or in the Prerogative resulting from it can be effected without the consent of the Princes."

Holdsworth's arguments are plausible. To what extent prerogative is a source of Paramountcy will be discussed later. In legal phraseology, prerogative means the pre-eminent power or special privilege enjoyed by the Crown. It is that power exercisable by the Crown without recourse to Parliament, a residue of discretionary authority allowed to it. It is one of the vital elements of Paramountcy. Paramountcy, conversely speaking, is a part of prerogative; that is, it is that portion of the prerogative which pertains to the Crown's relationship with the Indian States. "Paramountcy is a part of the Royal prerogative. Whereas by the common law and by statute, the prerogative extends over all the countries which are governed by the Crown, Paramountcy only extends to the Indian States, and the States are only subject to that part of the prerogative which is included in the term Paramountcy."¹ That the growth of Paramountcy has contributed to the augmentation of the sphere of prerogative cannot be controverted. But to say that it has added a "distinct" prerogative is to invent a novel doctrine. Holdsworth's theory is based "on legal and technical grounds as well as on grounds of policy." The incorrectness of the alleged legal basis is examined by Sir P. S. S. Aiyer whose arguments that the relationship involved is not personal are discussed elsewhere. Sastry points out the anomaly of Holdsworth's doctrine. He says: "As an eminent jurist he is no doubt aware of the curious proposition he is advancing. There can be no limitation upon the doctrine of legal supremacy of Parliament in Great Britain. Secondly, there is not in constitutional law a single prerogative of the Crown which Parliament cannot touch by enacting a statute for its abridgement, curtailment or other mode of regulation".² There can be no controversy about

1. S. M. Bose, *The Working Constitution of India*, p. 22.

2. K. R. R. Sastry, *Paramountcy and State-Subjects*, p. 20;

the final statement of Holdsworth that Paramountcy has enriched the prerogative powers of the Crown. But it has not added any "new and distinct" prerogative. Holdsworth's arguments are based more on considerations of imperial policy than of constitutional law. *How far the Crown was obliged to respect its so-called 'new and distinct' prerogative, unamenable to Parliamentary jurisdiction, will be considered in a later chapter dealing with the various obligations of the Crown.*

Instead of Paramountcy being a part of prerogative, its converse is nearer truth. Only a part of Paramountcy forms a part of prerogative. There is some common ground between them; the two form intersecting circles. The whole of Paramountcy is not part of prerogative; for, much of Paramountcy lies outside prerogative. Granting that Holdsworth's view as to Paramountcy being a part of Prerogative is partly acceptable, it does not follow that such a prerogative is a separate, and distinct one and that it lies outside the ambit of Parliamentary jurisdiction. Citing Anson and Jennings, Bhattacharya states that "The prerogative of Paramountcy can certainly be regulated or abridged or even taken away by Parliament. It is surprising indeed, to find that prerogative is not the source of Paramountcy; but that the growth of Paramountcy has added a new and distinct prerogative to the Crown. There is no warrant for the proposition for treating Paramountcy of the Crown as a class apart from other prerogatives There is a long stream of decisions which point out clearly that there is not a single prerogative of the Crown which Parliament cannot limit or regulate or even abolish."¹ It has been held that "when the operation of a statute overlaps the exercise of a prerogative, the prerogative is superseded to the extent of the overlapping."² Holdsworth's doctrine of a new and distinct prerogative of Paramountcy is not legally tenable; so also his other thesis that prerogative is not a source of Paramountcy.

1. K. K. Bhattacharya, *The Indian Constitution*, p. 95;

2. *Attorney-General Vs. De Keyser's Royal Hotel Ltd*, 1920 A. C. 508.

The doctrine that the relationship of the Crown with the Indian States was governed "by rules which form a very special part of the constitutional law of the empire" is most satisfactory. This, according to the Indian States Committee, is "the correct view."¹ of the relationship. It cannot be denied or doubted that "the Indian States are from an external point of view a unit or units in the British Empire."² According to Tupper, for external purposes the whole map of India is red. As observed by Westlake, "Wherever a body presents itself externally as a unit,..... the term 'constitutional' may fairly be used to express whatever political relations, possessing any degree of fixity exist between them, the smaller bodies, or individual men that constitute the unit."³ But, where the relationship is not amongst the units *inter se* or between any unit and its individual men, but between the units collectively taken on the one hand, and their common superior, on the other, the word constitutional cannot be used *simpliciter*. It requires a qualification. The Indian States are in a way parts of the British Empire and whatever rights or obligations flow from their being so placed, may be said to belong to the realm, not of constitutional law as commonly understood, but of "Imperial Constitutional Law"; that is, a system obtaining among the diverse parts of the British Empire. The Indian states Committee are of opinion that Paramountcy must be treated as a "very special part of the constitutional law of the Empire."⁴ With approval they cite the opinions of Westlake and Pollock. The former regarded the rules regulating the relationship between the Paramount Power and the Indian States as "part of the constitutional law of the Empire."⁵ The latter too expressed a similar view.

1. Report of the Indian States Committee, para, 43;
2. Julian Palmer, *Sovereignty and Paramountcy*, p. 22.
3. *ibid*;
4. Butler Committee Report para 43;
5. Westlake, "The Native States of India" *Law Quarterly Review*, xxvii.
6. Pollock, *Law Quarterly Review*. xxvii.

Can Paramountcy be interpreted in terms of imperial administrative law? The phrase 'administrative law' is a technical one. It has a special meaning of its own. Paramountcy has little to do with the 'constitution' either of the Empire or of the protected dependencies. It is more or less a system of political control and imperial administration. But as already pointed out, the epithet 'administrative,' although more appropriate, is misleading; and therefore it deserves to be rejected.

Often a question is asked: "Can the relationship be explained in constitutional or legal terms, or does its whole *raison d'être* consist in ensuring the absolute Paramountcy of the British Government over the States?"¹ This is a highly relevant question. An answer to it would be, that Paramountcy can to some extent be explained in terms of law; but it would be hazardous to say exactly if it is constitutional law or any other known kind. Among the legal and political theories prevalent, the one which is most satisfactory is what we may call the '*Imperial Constitutional Law Theory*'. It merits preference over the rest; for Paramountcy is at one and the same time an imperial authority emanating from the supremacy of the Crown, as well as a constitutional relationship founded on treaties and usage. Further, the rules and conventions concerning its content, extent, and exercise are fairly ascertainable and they constitute some kind of law. Recommendation of this theory as the most satisfactory does not mean any total rejection of other doctrines. Each has an aspect of truth and holds good in some cases or the other. Although this seems more sound than the rest, it cannot be regarded as infallible or perfect. The theory of relativity has as much place in law as in the world of physical sciences.

The various legal and imperial theories of Paramountcy have been briefly reviewed. No single theory is by itself adequate. They are all mixed theories. Some are called legal and others imperial. This division was made just for purposes of convenience. The predominant traits of each doctrine have been the criteria for

1. V. B. Kulkarni, *The Future of Indian States*, p. 42.

designating the doctrines as legal or imperial. The conclusions reached may be indicated here.

The first legal theory related to the interpretation of Paramountcy in terms of international law. Paramountcy lies outside its fold. Secondly, Paramountcy cannot be brought under any system of interstatal law. Thirdly, the contractual theory is not acceptable in its entirety. Fourthly, the theory of cession, that is, that the Crown was a donee of Paramountcy, looks both far-fetched and fanciful. It is a wishful argument. Fifthly, the principles of pure constitutional law have no bearing on the relationship between the Indian States and the British Crown. Lastly, it is inaccurate to describe Paramountcy as a trust or a type of equitable guardianship.

The first doctrine examined under the second class of theories is of Paramountcy as a sort of feudal supremacy. The feudal theory has been considerably discredited. Secondly, it would be inaccurate to treat Paramountcy as part of 'Indian Political Law.' Thirdly, the doctrine of military protection errs on the side of exaggeration. Fourthly, the relationship between the Crown and the Indian Princes is not personal. Fifthly, Paramountcy is not co-extensive with prerogative and is based on other sources also. Lastly, the principles of imperial constitutional law may be said to govern the institution.

CHAPTER VI

Paramountcy and Suzerainty.

Paramountcy and Suzerainty convey notions which appear similar and even identical. The relationship between the British Crown and the Indian States has all along been described as that between a Suzerain Power and its subordinate allies and feudatories. In the historic declaration of Lord Canning the term is used more than once. Canning stated, "There is a reality in the suzerainty of the Sovereign of England". The Crown's Suzerainty had been established for generations. It was in 1889 that Parliament clearly declared that the relationship between the Indian States and the British Crown was that of a suzerain and a subordinate respectively. The Interpretation Act of 1889 defines India thus: "The expression 'India' shall mean British India, together with any territories of any native Prince or Chief under the Suzerainty of Her Majesty." The earlier phrase "Paramount, Supremacy" and a similar expression "*de facto* supremacy" employed in a pronouncement of the Government of India in 1877, as well as in the historic Manipur Resolution, dated the 21st of August 1891, are alternative terms. In a dispatch dated the 28th August 1891, connected with the Manipur case, it is mentioned that the "Native States are under the suzerainty of Her Majesty." Lord Minto's pronouncement in 1909 is to the same effect. He said: "The relationship of the supreme Government to the States is one of Suzerainty."³ In the course of a debate in the British House of Commons, Sir Samuel Hoare (now Lord Templewood), then Secretary of State for India, spoke of the Crown's Suzerainty and also employed the word "Paramountcy."⁴ In the Government of India Act, 1935, in section 311, the expression 'suzerainty' is twice employed. The section reads

1. Indian States Committee Report, para 22;
2. 52 & 53, Victoria, ch.63, sn. 18 (5);
3. Minto's Udaipur Speech.
4. *Parliamentary Debates*, Vol 2991, col 1235.

thus: "Indian State" includes any territory belonging to or under the Suzerainty of a Ruler who is under the Suzerainty of His Majesty." Even in the latest and the last Parliamentary measure concerning the Crown's relationship with the States, namely the Indian Independence Bill of 1947, under the heading 'Lapse of Paramountcy' there is section 7 (i) b, wherein we find the words "Suzerainty of His Majesty over the Indian States." 'Lapse of Paramountcy' appears in the Bill and not in the Act.

The foregoing instances suffice to show that the word most commonly employed to signify the relationship between the Indian States and the British Crown, is Suzerainty. A passing reference may be made to the distinction between the two phrases 'territories belonging to' and 'territories under the Suzerainty of' a Ruler. The former phrase may imply sovereignty and the latter suzerainty. It may also be noticed that except in the few utterances of a Viceroy now and then, the term 'Paramountcy' is not officially used at all. Its absence from the Statute Book is conspicuous and seems to be more than accidental.

Before analysing the differences or at least the distinctions between the two terms, it must be stated that the employment of the word 'Suzerainty' although sanctioned by parliamentary usage, does not, by the operation of any prescriptive principle convert it into an alternative for the more accurate word Paramountcy. In constitutional law each of these terms has a meaning which is its own individual property. Where Suzerainty is taken in a loose sense it can be said to include Paramountcy; but it does not therefore follow that it means it. The term Suzerainty "appears to be one of those terms of art which are invariably misunderstood and misinterpreted."¹ Sen regards it as a term of art' or a technical term. It is possible to interpret the expression at least in three ways. First, it may mean general overlordship; secondly, it may stand for imperial overlordship; and thirdly, it may signify feudal overlordship. The last was its original

1. Sen, *Indian States*, p. 33;

signification. The first meaning is too wide and the second also seems somewhat generic. That there has been a frequent confusion between Paramountcy and Suzerainty, is evident from the following definition of the latter with reference to the former. Lord Selborne defined Suzerainty thus: "Suzerain is lord paramount to the people who are subject to it.....the control of foreign and frontier relations essentially distinguish a paramount power. No war can be made upon adjoining Native tribes, no treaty can be made with (Foreign) Powers except by the authority of the (Suzerain) country."¹ In this definition the distinction between a Suzerain Power and a Paramount Power is obscured and even ignored.

Before going into the question of a comparative examination and analysis of the two concepts, it is necessary to see whether the suzerainty of the British over India is just a succession to the Moghal supremacy. That the latter was merely a nominal one after the battle of Plassey is evident from a reading of history. The Moghal Emperors had a fictitious suzerainty but their title was quite indefeasible. The East India Company virtually occupied the position held by the Moghal monarchs; at least from 1818. Yet their legal title to suzerainty dates from 1858, although a formal announcement was delayed until 1889. Lord Canning's reference to the "reality in the Suzerainty of the Sovereign of England which has never existed before," should be interpreted with reference to the titular suzerainty of the Moghal Emperor. The following remarks of Mr. Gundappa on the difference between Moghal and British Suzerainty, are instructive. Citing the passage, "The finding of history is that the Moghuls aimed at dominion and not at suzerainty", from the Imperial Gazetteer, he says: "It is a distinction essential to remember when determining the rights of a subordinate State. Dominion means merely the right to tribute and military service from the vassal State, without any thought for its welfare or interests; whereas Suzerainty implies part sovereignty and the obligation of protection for the remainder. The first is the exaction of a conqueror; the second, the consideration of a trustee."² But is

1. *Hansard*, Vol 260, p. 109.

2. *The States and their People*, p. 72;

dominion merely a right to tribute and military service? Is it just a *jus in re aliena*? In Roman Law it stood for full ownership. In later jurisprudence it began to have a restricted sense. In civil-law it means some 'right of possession.'¹ In British constitutional law it is used in a technical sense. Mr. Gundappa might not have spoken of Britain's trusteeship as distinguished from Moghal dominion in the technical sense of the words. Britain may be treated as a moral trustee of the Indian States; but there is no legal justification to treat her position, *vis à vis* the Indian States as that of a trustee. Further the Indian States of the present period, did not have a separate political or constitutional existence under the Moghal Empire, as distinct entities. They were within the Empire and both their Rulers and subjects owed allegiance to the Emperor as his vassals. They derived their power from him. The ancestor of the Nizam was a mere Subbadar of the Deccan under the Emperor. The ancestors of many Maratha Princes were no better than provincial governors, though they successfully challenged imperial authority. It is only under the British that the States gained an existence separate from the rest of India. To speak of 'Moghal dominion', and 'British trusteeship' and distinguish them on the basis that the former meant little more than a right to tribute and military service does not appear to be legally accurate. The real difference between Moghal and British overlords lies in the fact that the former was nominal whereas the latter was substantial.

Paramountcy and Suzerainty have been used as convertible. Sastry poses a question: "Is the term Suzerainty correct to describe the relations between the Crown and the different classes of the Indian States?"² He does not give any answer, perhaps because of the existence of 'different classes of Indian States.' Before 1889 the earlier statutory definition of Indian States spoke of them "as the dominions of the Princes and States in alliance with Her Majesty."³ The substitution of 'suzerainty'

1. *Oxford English Dictionary*.

2. Sastry, *Indian States*, p. 68;

3. Sen, *The Indian States*, p. 33;

for alliance is regarded as both proper and accurate, as the former "more accurately indicates the relations between the Rulers of these States and the British Crown as the paramount authority throughout India."¹ That 'Paramount authority' is superior to Suzerain authority will be shown in due course. Both the terms are derived from French and both are not technical. The main differences between them may be mentioned.

As a political and legal concept, Suzerainty is much older than Paramountcy. Originally it did not import any constitutional or international relationship. It meant the immediate vassal of the King. It is said that "The term was rare in feudal times. It was used in France to describe a feudal lord."² According to Westlake, "Suzerainty.....was the proper term in the Middle Ages for the relation of a feudal superior to his vassal."³ The term was mostly used to denote the personal status of the feudal barons not only *inter se*, but also *vis a vis* the King. In a feudal polity there is no reference to any 'Paramountcy'. Feudal Suzerainty, through originally a personal tie between a lord and his *villicus*, acquired a 'real' character subsequently. As observed by Sidgwick, "The strictly feudal relation is that of vassal to lord. This, to use legal terms, is at once personal and real. The vassal owes his lord the loyal service of a dependent freeman—and especially service in war, but he owes it on the score of joint right in a portion of land, ultimately called a fief."⁴ Thus the relation is a civil law one. In the evolution of feudal suzerainty, there is noticeable, a "Coalescence of three causes or tendencies—(1) Intenser and closer personal relationship of lordship and service; (2) the relation of the individual to his land; (3) the exercise of important governmental functions over free men."⁵ From this it is clear that there is nothing here like the later relationship

1. Ilbert, *Government of India*, p. 292;

2. *Encyclopaedia Britannica*;

3. Westlake, *Collected Papers*, p. 90.

4. Sidgwick, *Development of European Polity*; p. 202;

5. *ibid.*, 200.

contemplated by suzerainty as that of a protecting or patron power over a vassal state. Feudalism was a system of civil and military gradation of classes and ranks among the subjects of a State. It was in a descending order, from the King, the highest Lord, down to the serf or *villicus*. In between there were a series of suzerains and vassals.

After the Middle Ages, Suzerainty began to be "used as descriptive of relations, ill-defined and vague, which exist between powerful and dependent States The relation between a lord and his vassal has been extended to States of unequal power; it has been found convenient to designate certain States as vassal States, and their superiors as Suzerains."¹ Thus the term passes from civil law to international law. A suzerain State, by virtue of its superior strength, becomes, in regard to its vassals, a protecting State as well. But Suzerainty and Protectorate are distinguishable. The main features of Suzerainty which mark it off from Protectorate are, according to M. Gairai: "(a) Suzerainty proceeds from a concession on the part of a Suzerain; (b) the vassal State is bound to perform certain specific services; (c) the vassal State has larger powers of action than those belonging to a protected State; (d) there is reciprocity of obligation."² It has further been remarked that "While a protecting and protected State tend to draw nearer, the reverse is true of Suzerain and vassal States; a Protectorate is generally the preliminary to incorporation; Suzerainty, to separation."³ Hall says: "States under the Suzerainty of another State are vassals of the latter..... Such a State being confessedly part of another State, has those rights only which have been expressly granted to it and the assumption of larger powers than those which have been definitely conceded to it, is an act of rebellion,"³ (not of belligerency). This statement of Hall supports the theory that Suzerainty involves a concession to the vassals.

1. & 2. *Encyclopaedia Britannica* ;

3. Hall, *International Law*, p. 29.

Although Suzerainty has gained currency as a term of international law "its legal implications appear to lack precision."¹ "Having regard to its various applications in practice, the term 'Suzerain' would scarcely seem to imply any definite relationship in law."² Suzerainty is a term which "has no clear or precise signification. It has been extended to the control of European Powers through their colonies over imperfectly civilised peoples."³ Fiore defines Suzerainty as the "imposition by a superior State of every obligation of mediate and immediate dependency over another State in the exercise of its rights of sovereignty within."⁴ In the opinion of Oppenheim, Suzerainty is said to involve only a few rights of the superior over the inferior State. He says: "Modern Suzerainty involves only a few rights of the Suzerain State which can be called constitutional rights. The rights of the Suzerain over the vassal States are principally international rights.....Suzerainty is by no means sovereignty.....It is a kind of international guardianship, since the vassal State is either absolutely or mainly represented by the Suzerain State. This is the position of the Indian vassal States of Great Britain."⁵ It must be said that Paramountcy is neither Sovereignty nor Suzerainty. It is not an international relationship. It is fairly constitutional and mostly imperial. It has more rights than what are involved in Suzerainty. Where a Suzerain wields extensive powers, he may be regarded as possessing Paramountcy. Stubbs is said to have quoted the opinion of the Marquis of Salisbury that "Suzerainty did not preclude interference in internal affairs."⁶ But this is not the rule. According to Lord Cairns, the vassal "is to have entire self-government as regards its own interior affairs, but that it cannot take action against or with an outside Power without permission of the Suzerain."⁷

1. Sastry, *Paramountcy and State-Subjects*, p. 11;

2. Pitt-Cobbett, *Leading Cases in International Law*, vol.1, p. 165;

3. Black, *Law Dictionary*.

4. Quoted by Sen, *op. cit.*; p. 16

5. Oppenheim, *International Law* vol. 1, p. 162;

6. Sen, *ibid.*;

7. Sen, *ibid.*, p. 33;

Suzerainty is a slighter form of authority than Paramountcy; we may say it is Paramountcy diluted. It varies from the latter both in degree as well as in extent. Its sources are not the same. The vassals tend to grow at the expense of the Suzerain. It has been said by Hall that the vassal States "during a process of gradual disruption or by the grace of the Sovereign, acquire certain powers of an independent community, such as that of making commercial conventions, or of conferring their exequatur on foreign consuls. The position differs from that of protected States."¹ An opposite process is noticeable in the case of Indian States. At first, on the disruption of the three supremacies, namely Moghal, Maratha, and Sikh, the various vassals under their respective Suzerains, escaped suzerainty; but, instead of acquiring a better status, they lost what they had and became the dependent and protected States under the Paramountcy of the East India Company. When Moghal Suzerainty yielded place to British Paramountcy, the vassal States slowly got transformed into protected ones. Where there is a regular process of bringing some States under a common authority and placing them in a position of subordination, the following stages can be clearly discerned. First, there is equality; secondly, there is subordinate alliance; the third or penultimate stage is that of Suzerainty and vassalage. Joshi has brought this out thus; "The relationship (between the Indian States and the British) and the law which governs it have..... changed very rapidly and significantly from that of equality to that of alliance, from that of alliance to that of Suzerainty, and then to that of union and co-operation and ultimately to that of Paramountcy."²

Even like Paramountcy, Suzerainty means overlordship. The word 'Paramount' means "superior; having the highest jurisdiction, as Lord Paramount, the superior lord of the fee; the Sovereign."³ The superiority of position signified by Suzerainty need not always be an absolute one. When feudal relationships

1. Hall, *International Law*, p. 31.

2. G. N. Joshi, *The New Constitution of India*; p. 39;

3. Wharton, *Law Lexicon*.

are examined it will be seen that each superior lord was suzerain in respect of his inferior and vassal in respect of his superior. There could therefore be a feudal lord who was both suzerain and vassal at the same time. The two positions could be compromised in one individual. There were many intermediate or mesne lords-suzerain although there could be only one Lord Paramount. In a series of suzerain-vassals, which was a characteristic feature of feudal social organisation, all the suzerain powers culminated in the King who was the apex of the polity. He was the highest Suzerain Lord or Lord Paramount. Thus we see that while suzerainty is a concept amenable to the comparative degree, Paramountcy is always superlative. It is also significant that to describe the authority of the Indian Rulers over certain feudatories, the term employed is not Paramountcy, but Suzerainty. This phrase, "the territories under the suzerainty of a Ruler", occurs in section 311 of the Government of India Act, 1935.

If Suzerainty is a slighter form of authority, it follows that the vassals of a suzerain enjoy a larger measure of power than the subordinate allies of the Paramount Power. It has been expressed that "Suzerainty is title without power; Protectorate is power without corresponding title."¹ This aphoristic distinction is highly instructive. When it is said that a protectorate possesses no title, it does not mean that it is entirely devoid of legal foundations. Comparatively speaking a protectorate is the outcome of *de facto* supremacy. A vassal State possesses more authority than a protected State. Hibbert says: "Where a State is under the protection or Suzerainty of another, the State has perfect freedom except that it cannot enter into relations with other States without the consent of the State protecting or having Suzerainty over it..... In the case of States under Suzerainty it may be considered that such States are sovereign States."² Suzerainty can exist over both sovereign and non-sovereign States. It is more comprehensive in its scope. Lord Birkenhead observes that "Of States in a position of

1. Black, *Law Dictionary*;

2. Hibbert, *Jurisprudence*, p. 70;

dependence, a distinction must be drawn between those under Suzerainty and those under Protection (Paramountcy in the present context). A State under Suzerainty is one which being part of the Suzerain State has acquired certain of the attributes of international independence; the presumption being that in all other respects it remains dependent. Its subjects are the subjects of the Suzerain..... Its position in fact does not differ in international theory from that of an individual State in a federal system."¹ Enjoyment of sovereign status on the part of the vassal is not repugnant to the sovereignty of the Suzerain Power. Indian States on the other hand have neither any international status nor even full-sovereign power. They are also not parts of any Suzerain State.

There is the concession theory of Suzerainty. It is said that "Suzerainty proceeds from a concession on the part of the 'Suzerain'"² and "the title of the vassal is founded upon and derived from grants from the Suzerain State."³ This opinion finds favour with judges also. In the case against the Gaikwar of Baroda, the question of Suzerainty having come up for examination while construing the Interpretation Act of 1889, Bargrave Dealine, J., stated that "Suzerainty is a term applied to certain international relations between two sovereign States whereby one, while retaining a more or less limited sovereignty, acknowledges the supremacy of the other. Such a relation may be either in the nature of a fief or conventional, namely, by some treaty of peace or alliance in contrast with the fief, which is a sovereignty granted by a lord paramount over some defined territory accompanied with an express grant of jurisdiction."⁴ Hall also speaks of 'rights expressly being granted to' ⁵ vassals. The authority vested in the vassal States is therefore said to flow from the Suzerain. It has been axiomatically observed that "While a protectorate-

1. Smith, *International Law*, p. 34.

2. *Encyclopaedia Britannica*;

3. Sen, *The Indian States*, p. 35;

4. *Statham Vs Statham*, etc, 1912, Probate Dn., p. 95;

5. Hall, *International Law*, p. 29;

flows from or is a reduction of the sovereignty of the protected State, Suzerainty is conceived as derived from and a reduction of the sovereignty of the dominant State."¹ According to another authority, M. F. Despagne, "The term Suzerain is applicable to a case in which a State concedes a fief, in virtue of its sovereignty, reserving to itself certain rights as the author of the concession."² Where there is the operation of centripetal forces, Suzerainty may tend to get itself converted into Paramountcy—superior strength being its only title—as a result of the diminution of the sovereignty of the vassal States. While it has been opined that the vassals of the Suzerain derive their titles from the Suzerain, it must be admitted that the protected States of India have, in a majority of cases, their own prior titles. They may as well be considered as original inasmuch as they are not the result of any concession on the part of the Paramount Power. The continuing subordination of the Indian States is not at all derogatory to their original titles. But to go beyond this and say that all the Indian States can rely on their own original titles, or to press into service the theory of a grant of authority comprised in Paramountcy to the British Crown, is to pervert facts.

The Indian Princes resent being called vassals. Their complaint is intelligible, to some extent. They did not derive any sovereignty from the Paramount Power. "If the term 'Suzerainty' be construed *stricto sensu*, it is clearly inapplicable to the different classes of Indian States."³ According to Sen's classification, "Vassal States comprise all those States which derive their title from grants either from the British Government or from some other power to which the British Government have succeeded. Such are the *Sanad*-States of Bundelkhand and some of the Simla Hill States."⁴ But these do not exhaust the list of the States which have no original titles. The Nizam himself derived his authority from the Moghal Emperor; and Kashmir was created and Mysore, re-created. Apart from the fact that the vassal States have a derivative title, they are

1 & 2. *Encyclopaedia Britannica*;

3 & 4. Sen, *Indian States*, pp. 36 & 18.

constitutionally superior to the Protected States. The Indian States are not 'Protected States' in the technical sense of the phrase. For distinguishing States under Paramountcy from States under Suzerainty, we may, for the time being, treat them as Protected States.

In the matter of allegiance, the vassals owe a duty of loyalty and service. "According to feudal law the vassal owed certain duties to the Lord; he promised fidelity and service; and the Lord was bound to perform reciprocal duties, not very clearly defined, to the vassal—*Dominus vassallo conjux et amicus dicitur*. The relation between a Lord and his vassals, implied in the oath of fealty, has been extended to States of unequal power."¹ The vassals are under an obligation to render some specified services. These are in consideration of the Suzerain's concession. The essential characteristics of the relationship between the two are classified by Sen as follows. They are:— "(a) The Suzerain State is under an obligation to protect a vassal State; (b) The vassal State is under an obligation to observe the following conditions:-

- (1) It must remain loyal and faithful to the Suzerain;
- (2) It must render service in times of war;

(c) The title of the vassal State is not original; (d) In almost all cases the vassal State pays tribute to the Suzerain; (e) In all its external affairs, the vassal State is governed by its Suzerain."² Paramountcy imposes many of these and other conditions also.

A vassal State "owes homage to the *Dominus Feudi*, and may not make war against him; but its sovereignty is not thereby impaired."³ In this respect its status is better than that of a Protected State whose sovereignty is inchoate. The subjects of a vassal State owe allegiance only to their immediate superior. But "In regard to the Indian States, does the condition of loyalty

1. *Encyclopaedia Britannica*;
2. Sen, *The Indian States*, p. 36;
3. Holland, *International Law*, p. 65.

apply only to the Princes and not to the subjects of the Princes, just as in the early feudal system?In the Manipur case the principle which William the Conqueror established for the feudal system in England, that the whole population owes allegiance to the King, in addition to the ties which may bind individuals to mesné lords, was seen in operation.....The subjects also were tried and punished."¹ But this was an extraordinary procedure. The subjects of an Indian State "are foreigners in the eye of the law of British India."² The ways of Paramountcy are extra-judicial. Certain principles were laid down in the Manipur case: "These principles were the repudiation by the Government of India of the application of International Law to the Protected States.....and the unquestioned right to remove by administrative order any person whose presence in the State may seem objectionable."³ Thus it was established that "The obligation of loyalty rests not merely on the rulers of States, but on their subjects as well, since they, equally with their rulers, enjoy the protection of Her Majesty."⁴ The subjects of an Indian State owe double allegiance, one to their own immediate Ruler and the other to the Paramount Power. On the other hand the subjects of a vassal State have only one loyalty, that is, to their Ruler.

Suzerainty is a statutory expression; Paramountcy is not. The latter is therefore more elastic than the former. It brings in its train many rights of intervention in the domestic affairs of the Protected States. These rights are not always based on treaty or agreement. In many matters not provided by treaty, a residuary jurisdiction on the part of the imperial Government is considered to exist, and the treaties themselves subject to reservation that they may be disregarded when the supreme interests of the Empire are involved."⁵ A suzerain authority has no such discretionary powers of interposition. An acceptance of Suzerainty does not mean such surrender of sovereignty as subordination to

1. Westlake, *Collected Papers*, pp. 222-223;
2. *Imperial Gazetteer*, Vol iv p. 83.
- 3 & 4. Lee-Warner, *Protected Princes of India*, pp. 173 and 324.
5. Hall, *International Law*, p. 28;

Paramountcy would involve. It has been said that "A modern description of a State as subject to Suzerainty does not, by itself, shut it out from any of the rights that were enjoyed by the States of the Holy Roman Empire as sovereign States and were so called; while they recognised the Emperor as their Suzerain Power."¹ A State under Suzerainty does not on that very account suffer circumscription of its sovereignty, whereas a Protected State under Paramountcy loses much of its stature.

Suzerainty can have meaning with reference to the Crown's relations with the Indian States if only it is interpreted in terms of Paramountcy. Conversely, "only in the loose sense of Paramountcy would Suzerainty have a meaning in India."² Although "Suzerainty is the name given to the sum total of powers exercised by the British Government over the Indian States"³, it cannot be accepted as a substitute for Paramountcy. This is so notwithstanding the fact that "It is a term which is perhaps incapable of definition..... which is usually employed to indicate the political authority exercised by one State over another and approximating more or less to Sovereignty."⁴ With all its recommendations it proves inadequate. It does not convey the unique ideas implied in the rare relationship which prevailed between the British Crown and the Indian States.

There has been a general tendency to regard Paramountcy as an alternative term for Suzerainty in spite of the appositeness of the former. A writer mixes up Suzerainty with Protection. He says: "Certain of the native States of India were formally classed 'Protected States' and they are now defined as being under British Suzerainty, implying control over foreign relations, and being hardly distinguishable from Protection"⁵ Paramountcy

1. Westlake, *op. cit.* p. 90.

2. Panikkar, *The Indian States and the Government of India*, p. 149;

3. Gundappa, *The States and their People*, p. 9;

4. *ibid.* p. 20.

5. Manfred Nathan, *Empire Government*, p. 143;

involves both a right to protection as well as a liability to intervention: "The relationship of Protector and Protected State is usually established or confirmed by an unequal treaty—unequal in the sense that the Protecting State promises (and also claims) without reciprocity, to intervene when necessary..... In general it may be said that when by the terms of a treaty, one State guarantees the possessions of another, the latter is to be considered as the dependency of the guaranteeing State..... When it involves cession of any portion of the sovereign discretion of the State, it is equivalent to the formal recognition of the Paramount control of the guarantor State."¹ Acceptance of Paramountcy means exposure to intervention. This is not so in the case of a State under Suzerainty. In regard to the subordinates of a Suzerain Power, namely, Vassal States, "Austin says that they are completely sovereign..... which appears to be a rational view."² Still the Indian Princes did not appear to have liked the gentler word Suzerainty which was deleted in the Government of India Act, 1935, and the words "any territory..... which His Majesty recognises as being such a State" were introduced. From a long established status under 'Suzerainty' the Indian States were shifted to a precarious position—their status depending purely on recognition by His Majesty. Surely a position "under Suzerainty" was safer than one conditional on recognition."

By way of summing up we may say that Paramountcy and Suzerainty are not synonyms. The latter is a generic term; and to some extent, the former is its species. There are differences between the two. These can be appreciated if the distinctions between vassal States and protected States are borne in mind. Protected States do not possess as much sovereignty as the vassals do. Indian States have no international life; vassal States can have international status. Where the dominant State centralises control, its suzerainty may become Paramountcy; the former is a stage on the road to Paramountcy, that is, of a vassal State becoming a dependency.

1. Stowell, *International Law*, p. 342;

2. Hibbert, *Jurisprudence*, p. 72.

Although Suzerainty is an older and more technical term than Paramountcy, its implications are vaguer ; this is so inspite of the fact that it has been quite frequently subject to judicial determination. Suzerainty is international guardianship ; Paramountcy is imperial authority. Suzerainty is not absolute supremacy ; Paramountcy is not so limited. It is almost unlimited power. While Suzerainty is capable of wide application, Paramountcy stands exclusively for the singular authority of the British Crown over the Indian States., and has, on that score, attained a specific character.

CHAPTER VII

Paramountcy and Sister Systems.

An initial explanation is necessary for the inclusion of certain institutions which have very little in common with Paramountcy, under a caption "Sister Systems." It has been universally recognised that Paramountcy is a class by itself. Still a comparative study of some outstanding systems of superstatal control will do good; it will bring home the uniqueness of Paramountcy. Paramountcy is a singular but not the sole form of superstatal authority. As a result of the imposition of this power over the Indian States, there has been the emergence of a relationship "of a unique kind, without a close parallel within the British Empire or elsewhere, based on a multitude of specific agreements."¹ There are diverse kinds of imperial control. A vanquished or a suppliant State may be allowed to remain as a vassal or feudatory instead of being annexed. Where a State is thus spared its life, it forfeits its liberty. Acceptance of protection implies acknowledgement of overlordship: Rome appears to have adopted, if not invented, the system of imperial protection. As its Empire grew in area, it extensively practised the system. It has been said that "With the Romans, when a State had been conquered or had entered into a treaty by which it was to receive the protection of the Roman Power, and it was desired to leave such a State a semblance of independence and not formally to annex it, the dominant power, that is, Rome, became the *Patronus*, and the subject city or territory, became the *cliens* or dependant."² If protection is an imperial privilege, there are some types of international guardianship akin to it. The common as well as the distinguishing characteristics may be mentioned.

One may speak of the British Empire as a veritable museum of political systems. There are specimens of all sorts of States. It is

1. Coupland, *The Indian Problem*, p. 12;

2. Manfred Nathau, *Empire Government*, p. 138.

most expressively described as a "multicellular State."¹ It contains practically all political patterns which constitutional law or history can offer. From the point of view of constitutional relations, the unity of the Empire and the bewildering diversity of its component parts, present problems of a highly complex character. The word Empire is not defined by law; but jurists have attempted to define it. According to Halsbury "The term 'British Empire' denotes the whole of the territories over which the King possesses sovereignty or exercises control akin to sovereignty. It includes dominions, protectorates, protected States and other possessions. A British possession is defined by statute to be any part of the British dominions except the United Kingdom."² The expression 'other possessions' includes India; 'Control akin to sovereignty' means the authority of the Crown manifesting itself in its Suzerainty; Paramountcy and so on. The word Empire denotes less—"a precedence over other Kings possessed by a ruler standing at the head of a composite State which may embrace Kings among its members."³ 'Precedence' in rank or authority is not the same as "sovereignty or control akin to it." Apart from dominions, colonies, protectorates and possessions, the British Empire contains a number of dependencies. They are places which have not been formally annexed to the British Crown and are therefore, in strictness, foreign territory, but which, nevertheless, are practically governed by Great Britain and by her represented in relation to foreign countries."⁴ It is hard to bring the Indian States under dependencies as they were neither practically, much less theoretically 'governed by Great Britain'; no doubt they were controlled. It was to explain their anomalous position that there "was invented the principle of Paramountcy, for, the States did not form part of the Empire, but neither were they sovereign powers. They were neither feudatories of the Government of India, nor protectorates, nor merely allies.....Yet by virtue of Paramountcy

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1. Maitland, *Political Theories of the Middle Ages*.
 2. Halsbury, *Laws of England*, Vol. xi, p. 3;
 3. Ernest Baker, *Encyclopaedia, Britannica*;
 4. Halsbury, vol x., p. 503;

the Crown stood towards them as it were in a second and superior relation." ¹ If analogous systems such as protectorates, mandates and spheres of influence are examined, the singular relationship signified by Paramountcy can be fully appreciated.

The term *protectorate* is a comprehensive one. It is generally used loosely. It means the system whereby a strong State accepts the responsibility or *assumes* the right of guarding a weak State and of safeguarding its interests like a trustee. The term 'protector' was often applied to the office of a regent or protector of a Kingdom during a minority, interregnum or civil war. In this sense England was under Oliver Cromwell, "Lord Protector of the Commonwealth." In modern constitutional law the word has acquired a technical signification. First "it was a system whereby the great conquerors or commercial people masked, so to speak, their irresistible advance." ² Then it began to suggest a sort of guardianship or trusteeship. This was particularly a cover under which the European powers began to dominate over the 'native tribes' of Africa.

A modern protectorate "is a specific area of territory, not within the British dominions, over which the King exercises sovereign rights, mainly based on the Foreign Jurisdiction Act." ³ Over the Indian States on the other hand, the Crown as Emperor, and not as King, exercises not 'sovereign rights', but rights of Paramountcy. Paramountcy is not the same as the authority involved in a protectorate. But as the Indian States under the Paramountcy of the Crown are dependent for protection on the Crown, they may be regarded as a species of protectorate. It is suggestive that Sir Lewis Tupper, one of the earliest authorities on the Indian States, should have chosen for his book on that subject, the title, "Our Indian Protectorate." As "The status of different parts of the

1. Sir George Schuster and Wint, *India, and Democracy*, p. 126;

2. Sir Alfred Lyall *Rise and Expansion of the British Dominion*, p. 326.

3. Anson, *The Law and Custom of the Constitution*, Vol. ii, p. 62;

Empire has been largely determined by historical accidents and not regulated by any definite legal theory "1 it is necessary to allude to the circumstances and motive which shaped them. It has been rightly remarked that "Never was Empire less the result of design than the British Empire of India." 2

Protectorates are defined as territories which are not part of the British dominions but those whose foreign relations are controlled by the King. The term protected State is applied to those protectorates in which the administration is conducted in the name of the local sovereign." 3 Protectorates are an ingenious contrivance to rule a people without absorbing their territory. They are imposed upon politically backward communities and ostensibly to their advantage. The protecting power is supposed to respect the autonomy of the protected state. "In protected States the territory is that of the protected Government which exercises internal territorial sovereignty and some measure of foreign jurisdiction. The right of the Crown over such territory is not of *dominium*, but of *jus in re aliena*." 4

Protectorates are of different kinds. But "the one common element in protectorates is the prohibition of all foreign relations except those permitted by the protecting State..... The Protected territory remains, in regard to the protecting State, a foreign country, and this being so, the inhabitants of the Protectorate, either native born or immigrant settlers, do not, by virtue of this relationship between the protecting and protected States, become subjects of the protecting State." 5 Thus the territories comprised in a protectorate, although subject to the control of the Crown, are not British territory; nor are the inhabitants of the protected States subjects of His Majesty. Further a protected State does not, on

1. Keith, *The Government of the British Empire*, p. 463;

2. Ramsay Muir. *The Making of British India*, p. 2;

3. *Halsbury*;

4. Salmond, p. 519;

5. *Rex Vs Crewe*, 1910, 2 K. B. 576 ;

the mere ground of its coming under protection, lose its sovereignty. "The general rule is that the protected State does not cease to be a sovereign State if such was its previous status: Its head is still entitled to the immunities and dignities of a sovereign ruler."¹ The condition of possession of sovereignty is dependent on a previous enjoyment of it. A State can have claims to retain its prior sovereignty. Not so where it was not existing, as in the case of Indian States which were under one of the three powers, namely, the Mughal Empire, the Maratha Supremacy, or the Sikh Kingdom. "It is not in accordance with historical fact that when the Indian States came into contact with the British Power.....each possessed.....full sovereignty."² They cannot therefore be regarded as possessing a status better than that of the protected States properly so called. The rule laid down in the *Kelantan* case does not help the Indian States as they were, before coming under British Protection, "subordinate or tributary" to other Powers. There is another aspect also. As a protected State has no external sovereignty, its subjects are entitled to British diplomatic protection while they are abroad.

Protectorates are the inevitable sequel of some diplomatic or military success. The main object underlying their establishment is exercise over territories not one's own an effective domination without resorting to actual annexation. The system affords two distinct advantages. First, it enables the protecting State to gain all the fruits of a victory minus the burden of ruling a subordinate State; and secondly, the protecting State is rendered absolutely powerless against the protector. This is exactly what happened when the Indian Princes came under British protection. They were kept in possession of their territories with all the tasks of administration left to themselves; but they had no freedom to act in external affairs. The motive underlying the policy of allowing local rule to go on is quite evident. The gratitude of the ruler and his loyal subjects is won; help, assistance

1. *Duff Co Vs. Kelantan*, 1924, A. C. 797.

2. Butler Committee Report, para 39.

and service, follow. A champion of British policy extols protectorates as a "system of double trust, comprising the noble principles of (1) the enhancement of the well-being and liberty of native populations; and (2) development of material resources for the benefit of mankind."¹ The pretensions of the first 'trust' are transparent enough; and history offers sufficient commentary on the second. Both are too good to be true. The real purpose of the British, either in regard to entry into treaties of alliance or protection, or in regard to actual exercise of the rights of Paramountcy, has been clearly and honestly expressed by one of the pioneers of the system. The treaties framed by Lord Wellesley were so designed as "to deprive the Indian Princes of the means of prosecuting any measure or of forming any confederacy hazardous to the security of the British Empire, and to enable the British to preserve the tranquility of India,"² which was vital to their existence.

There are said to be two classes of protectorates, one over the so-called civilised countries and the other over the rest. Spain's protectorate over Andorra is an example of the first kind. The second class consists of the various European protectorates over African countries. Protectorates themselves are sub-divisible into protectorates *simpliciter* or colonial protectorates and protected States. According to Halsbury, "Territories which are not part of the British dominions but whose foreign relations are under the control of the King, are styled protectorates. The term 'Protected State' is applied to those protectorates in which the administration is carried on or conducted in the name of the local sovereign and is not subject to regulation by orders of the King in Council. In such States the Crown has not usually acquired power to exercise jurisdiction which is regularly exercised in the protectorates assimilated to the colonies."³ The term colony suggests just a territory and nothing more. As Anson puts it, "It is a geographical,

1. Ernest Barker, *Ideas and Ideals of the British Empire*, p. 139;
2. *Imperial Gazetteer*, Vol IV, p. 10.
3. Halsbury, xi, p. 6;

and not a political term.”¹ A colonial protectorate is established over countries possessing no organised or stable governments. Protected States on the other hand represent political communities. The Asian States such as the Federated and unfederated Malay States, North Borneo (British) and so on constitute ‘Protected States.’ The administration is carried on by the local Chiefs.

Salmond classifies protectorates into three kinds with reference to the measure of internal sovereignty possessed by them. “The first consists of those protectorates over which the Crown exercises external sovereignty only. The internal sovereignty is left wholly to the local government to which the territory is still regarded as belonging, notwithstanding the fact that as against all other States the territory is recognised as exclusively within British Jurisdiction.”² This is understood to be the case with the Protected States of India. But the Indian States do not possess full internal sovereignty. The second class of protectorates consists of “those in which the Crown exercises not merely exclusive external sovereignty, but also some measure of internal sovereignty concurrently with some other State (local), for example, Zanzibar. The third class of protectorates is that in which the Crown exercises exclusive internal sovereignty. The entire government of the protectorate is in British hands, examples being, the protectorates of Bechuanaland, Nigeria etc.”³ These are protectorates. Even States which belong to the second group on account of possessing organised stable governments do not have a claim to “such a degree of sovereignty as would exempt them from the jurisdiction of British Courts.”⁴ Rulers of ‘protected States’ exercising full internal sovereignty, such as those of the Federated Malay States, and likewise Rulers of Indian States, are held to be not subject to British municipal jurisdiction.

The Indian States are neither a protectorate nor ‘Protected

1. Anson, *Law and Custom*, ii, p. 62;
2. *Mighell Vs Sultan of Johore*, 1894, 1 Q. B., 149;
3. Salmond, *Jurisprudence*, p. 515;
4. *Ratshchedi Kama Vs. Ratshosa*, 1931, A. C., 784 ;

States' strictly speaking. According to Sir William Lee-Warner the United States of the Ionian Islands were analogous to the Indian States. He says that "notwithstanding the fact that they present a contrast to the Indian States in certain particulars, the general resemblance between the position of the two communities or groups are very striking."¹ The Ionian States long ago reverted to their mother country, Greece, consequent on the termination of the British Protectorate over them. Yet a brief comparison is instructive. The Ionian States are described as "perfect specimens of semi-sovereign States under the immediate and exclusive protection of the King of Great Britain." The Indian States are semi-sovereign protected ones. They are under many obligations to which the Ionian States were also subject. But, as admitted by Lee-Warner himself, their positions are not identical. The Ionian States occupied a better status in regard to their intercourse with foreign powers. "They were capable of being at peace with Russia, while England, their protector as it then was, and managed their foreign affairs, was at war with that power." ² No Indian State could ever enjoy that freedom. No doubt the territories of the Indian States lay outside British jurisdiction and their subjects owe allegiance to their own Ruler. These immunities are dismissed by Westlake as mere "niceties of speech"; but they are more than literary and legal subtleties. That the Crown has no direct administrative jurisdiction over the Indian States is well established, and no court of law has ever treated jurisdictional immunities of Indian States in Westlake's manner. But what is pertinent in the present context is the superiority of position enjoyed by the United States of the Ionian Islands which were under British protection. Westlake says: "Consuls, though not diplomatic envoys, were accredited to the Ionian Islands, which therefore were in a position of less dependence than the native Indian Princes. The extreme dependence of the latter amounts to complete international effacement."³

1. Lee-Warner, *Protected Princes* p. 380.

2. Westlake, *Collected Papers*, p. 218;

3. *ibid.* pp 218—220;

Writers on international law are not agreed on the question whether the Indian States constitute a protectorate. "To describe as protectorates the native States of the Indian Empire seems to be a misuse of the term"¹, says Lord Birkenhead. Again it is stated that "They (the Indian States) are not protectorates recognised by international instruments; they are not States visible at all to outside powers except as a part of the British Empire in India."² As another author puts it, "The protected State has a position of its own in the family of nations. It is not necessarily a party in war waged by the superior States."³ The same writer continues, "A protected State can be under the protectorate of two different States..... Andorra Republic is under France and Spain." The Indian States have no place in international law; they were necessary parties in all wars waged by the Crown; they were under the sole protection of the British Government, and of course no protected State in India is a republic. "For the purposes of international law a protected State is one which, in consequence of its weakness, has placed itself under the protection of another Power, on defined conditions..... Protected States such as those in the Indian Empire are not subjects of international law."⁴ Thus, although the Indian States are under British protection they cannot be deemed to be "Protectorates."

There is some justification for treating Indian States as a species of 'Protected States' in particular, as distinguished from 'Protectorates' in general including both colonies and States. The Protected States are a species of "protectorates, but are distinguished from the rest by the circumstance that the government is carried on as a rule in the name of the local sovereign, and is not exercised by Imperial Orders in Council."⁵ In regard to the Indian States it might be said that the government

1. Smith, *International Law*, p. 38;
2. Julian Palmer, *op. cit.*, 15;
3. K. R. R. Sastry, *International Law*, p. 42.
4. Hall, *International Law* p. 28;
5. Chalmers and Asquith, *Outlines of Constitutional Law* p. 397.

is carried on not only 'in the name of' but also by or under the authority of the local sovereign. It can be said that the protectorates of the colonial type are farther from the Indian States than the protected States are. In a protectorate, pure and simple, sovereign authority lies with the protecting Power. Its judicial system is subordinate to the Privy Council; appeals lie directly or indirectly to that body. Moreover "The system of administration is regulated by Orders in Council."¹ This is not so in the case of Indian States. The powers of administration possessed by them are extensive and are not regulated by Orders in Council. They enjoy considerable legislative autonomy which colonial protectorates are denied. "Protectorates (in the wide sense) differ both from colonies and protectorates of the type existing within the Indian Empire in that the protected community retains, as of right, all powers of internal sovereignty which have not been expressly surrendered by treaty or which are not needed for the due fulfilment of the external obligations which the protecting power has directly or implicitly undertaken by the.....act of assuming the protectorate."² That the Indian States do not possess 'all powers of internal sovereignty' will be pointed out in due course. The Indian States are both under British protection and Paramountcy. The latter involves an encroachment on the internal sovereignty of the Indian States. It might also be mentioned that while colonial protectorates were established as a preliminary step to annexation, the Paramount Power has categorically disclaimed all such designs. The Protected States are also guaranteed territorial integrity.

It was observed that the Indian States, being under British protection can be called, in a general manner, protectorates. They are not so technically. They are distinguishable from both protectorates (colonial) and Protected States. In Protectorates such as those of Bechuanaland and Swaziland, the Crown assumes and exercises full sovereign authority, of course.

1. Sabani, *Constitutional Law of England*, p. 223.

2. Hall, *International Law*, p. 150.

without any claims to territory. Paramountcy is not sovereign authority. Keith says: "It is impossible to overlook the analogy of the position of these territories (the Bechuanaland protectorate and the Swaziland *vis a vis* the Union of Basutoland) to that of the Indian States."¹ Elsewhere the same author observes. "From the legal point of view British jurisdiction in the Indian States is regulated by the Foreign Jurisdiction Act, 1890, so that they may be regarded in law as the Protectorates of the Crown."² But some of the Protected States enjoy privileges denied to the Indian States. In the opinion of Keith "Sarawak occupies a position of self-determination."³ This is the very antithesis of the status of the Indian States under Paramountcy. On the other hand, as far as the colonial protectorates go, "the protecting Power, by excluding other civilised Powers, doubtless makes itself responsible for the administration of justice, and has a corresponding right to administer it."⁴ The protected States are exempt from this extension of authority by the protecting Power. In respect of Indian States no generalisation is possible. In most cases judicial functions are discharged by the authorities of the States. In many semi-judisdictional States the Paramount Power takes upon itself certain executive and judicial functions.

Over "Protected States, the Crown exercises powers by Orders in Council, a species of jurisdiction delegated by Parliament," but over the colonial protectorates the legislative supremacy of Parliament extends."⁵ Over the protected States (including the Indian) the Crown exercises an authority derived from cession of jurisdiction, capitulation, acquisition by force of arms, or exercise of it when acquiesced in or not challenged. This authority, apart from being derived from grant, conquest or sufferance, is rendered effective by the Foreign Jurisdiction Act which specifies the various modes of acquisition of jurisdiction, such as usage and 'other lawful means'. The treaties

1. Keith, *The Sovereignty of the British Dominions*, p. xvii;

2. Keith, *The British Commonwealth of Nations*, p. 51;

3. Keith, *The Sovereignty* etc, *ibid*;

4 & 5. Sahani, *Constitutional Law of England*, pp. 30 & 220.

of cession are not regarded as covenants of international law and consequently no international liability is incurred in cases of their supersession. The powers vested in the Crown in respect of all the protectorates in general, including protectorates of the colonial type, Protected States properly so called, and Indian States under protection, may be said to be comprised in the term 'Suzerainty.' Some provisional conclusions may however be drawn. First, the authority of the protecting State over the protectorate of the colonial type amounts to sovereignty; secondly, authority of the protecting State over a protected State is non-descript, or something approximating Suzerainty, although vassal and protected States are distinguishable from each other as shown in an earlier chapter; and thirdly, the authority of the protecting State over the Indian States is distinctly denominated Paramountcy.

Another system which has some points of similarity with Paramountcy is that of Mandates. Halsbury defines them "as those territories which are administered by the British Government or a Dominion Government, under the terms approved by the Council of the League of Nations, having been transferred to the British Crown under the terms of Peace with Germany and Turkey in 1919 and 1923."¹ This institution was mainly the outcome of the first World War and the strenuous efforts of President Woodrow Wilson. "They are the outcome of the War settlement and represent a compromise between the claim for annexation and advocacy of international control. Protectorates developed under conditions in which annexation was inexpedient. On the competition from 1880 for African territories the various Powers soon asserted spheres of influence from which they hoped to exclude rivals and this early led to the conclusion of treaties of protection and the formal declaration of protectorates even over areas as regards which no treaties had been, or, in the absence of local authorities capable of entering into compacts, even could be, concluded. In the course of time the development of a protectorate may lead to annexation (Kenya 1920) and (Southern Rhodesia

1. Halsbury, *Laws of England*, Vol xi, p. 7;

1923).”¹ This long passage has been quoted as it clearly describes the salient features of Protectorates, Mandates, and Spheres of Influence.

If Protectorates resemble the system of Paramountcy to a little extent, Mandates resemble even less. They consist of commissions appointing a State to govern a people not *yet* qualified for independent international existence, of putting them under a sort of tutelage or on probation. The source of authority is an agreement under Article 22 of the Covenant of the League of Nations. It is a novel system purporting to be non-imperial. It is supposed to have been instituted in the interests of the ex-subjects of Germany and Turkey. Although the ideals it professes are laudable, as those of disinterested international guardianship, in practice it resembles imperial control. Sir John Salmond gives a true account of the system. “The essential common to British territories, protectorates, and mandates, is the exercise by the British Crown of an exclusive claim of external sovereignty Within the British protectorates and mandates, sovereignty of the Crown is extra-territorial.” It is this “exclusive claim” that places the mandated areas at the sole mercy of the Mandatory. Theoretically the power of the Crown is limited by the terms of the Mandate. But “Though the Crown may fulfil international obligations, constitutionally the Mandate is not binding on the Crown”² This view is based on judicial decisions. The question of the extra-territorial powers of the Crown is considered solely as one of constitutional law. It was held that “The position of a mandated territory governed by the Crown as Mandatory with certain obligations to the League of Nations is constitutionally no different from that of a Protectorate.”³ Recent and contemporary transactions in Africa and in the Middle Eastern countries show how the system was the

1. Halsbury. Vol xi, p. 128

2. Jennings and Young, *Constitutional Laws of the British Empire.*

3. *Jerusalem Jaffna District Governor Vs. Sulaiman Murra*, 1126. A. C. p. 321.

this end of an invisible imperial wedge. The territories were to be administered according to the laws of the mandatory "subject to safeguards in the interests of the indigenous population" which is really an imposition of alien laws bringing about the inevitable loss of freedom.

Mandates are one of the latest additions to the 'whiteman's burden'. The powers of the Crown over the mandated areas are not restricted to the terms of the mandates. The Crown derives authority otherwise. This makes its jurisdiction very extensive. "In English Constitutional Law the powers of the Crown under the Foreign Jurisdiction Act are just as extensive in the case of Mandates as in the case of Protectorates."¹ Mandates differ from Protectorates in that the protecting Power in the latter obtains rights against other Powers as well as over the native population, whereas a Mandatory in its capacity as guardian, assumes obligations both towards the people under its rule as well as towards the League of Nations. The inhabitants of a mandated territory are not the subjects of the Guardian State. As in the case of protectorates, the jurisdiction of the Crown over the territories comprised in the mandate is exercised under the Foreign Jurisdiction Act. The powers of the Crown as a Mandatory are more limited than its powers over protectorates as a Suzerain. "Whereas the powers of the Crown in a protectorate are practically absolute, when exercised under the Foreign Jurisdiction Act, or as an Act of State, the powers of the Crown in a Mandated territory are limited by the terms of the Mandate."² The former may be regarded as quasi-imperial and the latter as international in character.

Mandates have slender resemblance to the relations between the Crown and the Indian States under its Paramountcy. The judiciary of a mandated territory is recognised as possessing a power to examine the validity or otherwise of any act done by the executive

1. Jennings and Young, *Constitutional Laws of the British Empire*, pp. 6-7.

2. Salant, *Constitutional Laws of the British Empire*, p. 99;

authority. It has been held that "It is the right and duty of the Supreme Court of the Mandated territory to consider whether a particular ordinance issued by the High Commissioner of that is or is not consistent with the terms of the Mandate."¹ But acts of the Crown as Paramount Power in its dealings with the Indian States, are not justiciable. In regard to the source of authority, the Mandatory derives it from the Commission issued by the League in pursuance of the provisions of Article 22 of the League of Nations Covenant. Paramountcy, on the other hand, is a sum total of powers derived from treaties, usage and political practice; to some extent it inheres in the Crown by virtue of conquest. In a Mandate there is provision for referring any dispute concerning the interpretation or application of the terms to a tribunal, the Permanent Court of International Justice at the Hague. The protected States, including the Indian, do not possess this precious privilege. Lastly it must also be mentioned that there is the prescription of a time limit regarding the duration of a Mandate and the peoples living in the various territories comprised in the scheme have been recognised as having a right of self-determination exercisable by means of a plebiscite. Protectorates are under a sort of a perpetual tutelage or for a period co-extensive with the pleasure of the Crown. A Mandatory is after all an agent of an international organisation as well as a trustee; while the protecting State has its own title over the protected ones. But one common characteristic of Protectorates and Mandates is that "though subject in a greater or less degree to its control, they are not in the strict sense annexed to its dominions" whereas "Dominions and Crown Colonies are integral parts of the Empire." While in protectorates "there is the conduct of experiments in what is termed 'indirect rule' and their inhabitants do not become in virtue of their relationship with Great Britain full subjects of the Crown" it has lately been held by the Supreme Court of South Africa that "a breach of it (duty of obedience) by the inhabitant

1. *Jerusalem, Jaffa District Governor Vs. Sulaiman Murra* 1926, A. C. 321.
2. Keir and Lawson, *Cases in Constitutional Law*, p. 405,

of a Mandated territory exposes him to the penalties of treason.”¹ On the other hand it has been held that inhabitants of Protected States “do not owe allegiance in the proper sense of the term (allegiance to the British Crown); because allegiance exists only between the Sovereign and his subjects, properly so called which they are not.”² Mandated territories do not, under any circumstance, become part of the possessions of the Mandatory. It is possible in the case of protectorates, where “there is a natural, though not an inevitable tendency for protection to be transformed into actual annexation as was the case with Kenya in 1920. This annexation is made by virtue of the Prerogative which henceforth takes the place of the Foreign Jurisdiction Act.”³ The policy of annexing Indian States was abandoned long ago.

There is no statutory definition of the phrase ‘Spheres of Influence’. They mean regions over which some Powers possess special privileges exclusively available to them. According to Hall “the term is one to which no strict meaning is attached. Perhaps its indefiniteness constitutes its international value. It indicates the regions which geographically are adjacent to or politically group themselves naturally with possessions or protectorates, but which have not been actually reduced into control, that the minimum of the powers which are applied in a protectorate can be exercised with tolerable regularity.”⁴ The two adverbs ‘politically’ and ‘naturally’ in the clause “politically group themselves naturally with” do not go together. What is ‘natural’ need not agree with what is ‘political’. This ‘politically naturally’ is to be seen in yet another definition. “The term ‘sphere of influence’ was formerly current to indicate regions, geographically adjacent to, or politically naturally grouped with British possessions, or protectorates, which were not so reduced into control that the full powers of a protectorate were exercised but from which the British

1. *ibid*, also see *Rex Vs Christian* (1924), S. A. A. D. 101.

2. *The Ionian Ships*, (1855) 2 Ecc. and Adm., p. 226,

3. Keir and Lawson, *Constitutional Law*, p. 407,

4. Hall, *International Law*, p. 152.

Government claimed the right of excluding other European Powers. With the progress of division of backward territories among the great Powers, spheres of influence have passed on to protectorates. In a wider sense the term has been applied to areas of organised States over which the British Government has asserted special interest of an economic or political kind."¹ The history of India shows how 'spheres of influence' were converted into 'protectorates.' Birkenhead's definition of a sphere of influence is illuminating. "A sphere of influence or interest is the phrase vaguely used to describe an area which the Power enjoying it wishes to possess but is not prepared to occupy. It might be created by the unilateral Act of State or by agreement.....No powerful State would allow foreign interference within the area of a sphere of influence, and the attempt to interfere would probably be treated as a *casus belli*. To proclaim a sphere of influence is in fact to say 'Hands off' to possible competitors.....In these circumstances it is both convenient and accurate to include such spheres among the territorial belongings of a State."² If this should be so, the Indian States could also be said to have constituted Britain's territorial belongings' but they did not. They were not in the possession' of the Crown, much less under its occupation.

The title 'sphere of influence' is suggestive. There is no claim to dominium. It is a diluted form of protectorate, a kind of control or monopoly. Such spheres were carved out as a result of economic causes. When there was a scramble for Africa and its unexplored and unexploited wealth consisting of ivory, white and 'black,' gold, and diamond, and when China was opened by missionary enterprise which revealed great commercial prospects, spheres of influence were set up. As against the monopolies secured by the industrially advanced countries, a cry was raised by their less fortunate brethren whose economic interests were adversely affected. A case was made for equality of opportunity and a new

1. Halsbury, Vol i p. 6;

2. Smith, *International Law*, p. 96.

race began. Exclusive navigation and harbour claims were challenged. Many countries claimed equal rights with the others. Trade ambitions and the discovery of new sources of profit paved the way for the assertion of the modern doctrine of 'hinterland.'

But spheres of influence are established over places of political or military importance. Where external relations of any State, in the commercial as well as the political spheres are controlled by the British, it may fairly be assumed that they are within the 'sphere of influence.' In the opinion of Keith, Bhutan and even Tibet lay within the British spheres of influence, for "Great Britain remains definitely concerned with the foreign relations of Bhutan, and is not prepared to see Tibet fall into the power of China to such an extent as to render possible any damage to India."¹

Thus it might be observed that British jurisdiction, if not government, over non-British areas is exercised in various ways, constitutional, international, and imperial. In its liberal sense the expression 'protectorate' includes the Indian States. But the relations between the Crown and these are in many respects different from those over the rest, such as protectorates of the colonial type, protected States, etc. Paramountcy is a term in strictness applicable solely to the former as distinguished from allied but anomalous imperial and international relationships in respect of territories constituting protectorates properly speaking, mandated areas, and spheres of influence. For the present suffice it to say that the Indian States under Paramountcy have at some time or the other exhibited certain features discernible in each of its sister systems, namely protectorates, protected States, mandates and spheres of influence. As a result of British policy they have become a class apart and Paramountcy has accordingly acquired a reputation for its uniqueness.

1. Keith, *The Government of the British Empire*, p. 496.

CHAPTER VIII

Sources of Paramountcy.

A source of law is "any fact which in accordance with the law determines the judicial recognition and acceptance of any rule having the force of law."¹ According to this definition, 'a source of law' must be ascertained with reference to 'law' itself. There are some methods employed to explore the origins of legal phenomena. They may not prove sufficiently helpful in the case of a semi-legal concept like Paramountcy. It has a few extra-legal sources also, there being several factors which supply its content and determine its authority. Only a few of the sources which have a bearing on its legal aspects may be traced. It is difficult to draw any hard and fast line between its 'legal' and 'non-legal' sources. Referring to some of them, such as usage, sufferance, and political practice, Joshi observes, "these are only legal terms applied to legalise what was assumed and asserted or demanded by the Government of India, taking advantage of its superior position in which it found itself in the process of history."² Whether these sources were illegal *ab initio* or not, is not relevant for our purposes, as we are not exploring the sources of sources. There are some elements of Paramountcy which are derived from certain quarters which jurisprudence recognises as *fontes juris* or sources of law, and these may be examined.

In ordinary speech 'source' means the origin of a thing. In jurisprudence it is used both literally and metaphorically. "A thing is a source, an origin, a spring giving rise to a stream."³ It "connotes those agencies by which rules of conduct acquire the character of law by becoming objectively definite, uniform, and above all, compulsory."⁴ It connotes more; it signifies "the materials out of which the law is eventually fashioned through the

1. Salmond, *Jurisprudence*, p. 153 ;

2. G. N. Joshi, *The New Constitution of India*, p. 40.

3 & 4. Allen *Law in the Making* p. 1.

activity of the judges. This is the only meaning which can be attached to the term 'source of law'.¹ This definition of the term excludes what are regarded as 'sources' of Paramountcy, from the category of "sources of law". Paramountcy can hardly be reduced into any rule of law. There is neither provision nor occasion for the fashioning 'activity of the judges'.

Salmond first divides the sources of law into two kinds, formal and material. The former is "that from which a rule of law derives its force and validity."² It is the sovereign will of the State as manifested in the statutes and regulations of its government, as well as in the decisions of its courts. As for the finding out of the formal source of any legal rule, there is little difficulty. It just involves the location of the quarter wherein sovereignty resides. Which is the formal source of Paramountcy? It was expressed neither in statutes nor in judicial decisions. Was it the will of the Crown or the will of the State. A distinction between the two is both necessary and possible. If Paramountcy hardly derived its powers from any enacted law or judicial decisions it cannot be said that it was solely dependent on the will of the Crown. The Crown itself is not the final authority, as it is not the ultimate repository of the legal sovereignty of the State. So much of the authority of the Crown as is exercisable independently of Parliamentary control for the time being, may be considered as the prerogative of the Crown. But ultimately all prerogatives are liable to Parliamentary control. If Paramountcy was entirely and exclusively derived from prerogative, it would not be improper to hold that the formal source of Paramountcy was the executive discretion of the Crown. Even then it is the immediate source. But, if as maintained by some, Paramountcy lay outside the domain of Parliament, it has to be admitted that the will of the Crown was the formal source in the full sense. Part of Paramountcy lay outside the prerogative of the Crown; and even so much as was vested in that prerogative, was not above Parliament's reach. It

1. Keeton, *Principles of Jurisprudence*, p. 145;

2. Salmond, *Jurisprudence*.

would not be wrong to say that the immediate and ultimate formal sources of Paramountcy were the prerogative of the Crown, and the sovereignty of Parliament respectively. The ascertainment of any formal source depends upon the definition of law itself. Commenting on Salmond's definition, Paton says, "If we adopt a different definition, we may well reach a conclusion that the formal source is elsewhere.If law is valid because it is the habit of custom, then the habits of the people are the sources of law."¹ But this stretching of the meaning of 'sources of law' seems to rest on an assumption that the term has a wide meaning and is equivalent to 'the place whence law springs.' This is too elastic a construction. It is defective in another way ; it obscures the vital distinction between a formal and a material source.

By a material source of law is meant the original place wherefrom the law derives its content or substance. It is that which supplies body to the law. Salmond classifies material sources into legal and historical. The latter are those "which influence more or less extensively the course of legal development, but they speak with no authority." On that account they are "destitute of legal recognition", however valuable the material furnished by them might be. Still they are quite useful. A study of historical antecedents and circumstances is indispensable for a true and full understanding of any legal institution. Though for a lawyer, historical events have little 'legal' value, they are indirectly helpful to him. They enable him to appreciate the diverse contexts in which legal concepts and systems were shaped and polished. History provides the much needed data the evidentiary value of which cannot be ignored. To a legal historian as well as to a constitutional lawyer, they are highly helpful. It is only in the light of actual relevant facts that one can judge the legal soundness of certain claims and contentions. The relevancy and propriety of a historical approach becomes evident when one investigates the original position of some of the Indian States. For instance, to judge whether they were independent and sovereign before accepting the protection and

1. Paton, *Jurisprudence*, p. 52.

acknowledging the supremacy of the Paramount Power, a knowledge of their pre-Paramountcy annals is both valuable and necessary. It is for this reason that the 'historical' sources of Paramountcy are briefly described in a later chapter. But as antecedent circumstances, inspite of being the precursors of Paramountcy, are not sources, and much less serve as legal sources, they are not examined here.

But whether a source is formal or material, or if it is the latter, whether it is historical or legal, it is for a judicial tribunal to determine. With his characteristic judicial bias, Salmond may be said to always apply the acid test of recognition by a court of law, in his analysis of juridical concepts. We may say that he prefers a 'judicial' to a 'legal' test. The latter epithet is generic and includes the former. By 'legal' is meant anything accepted by the State as being in conformity with its policy or principles, the word being taken as almost synonymous with 'lawful'. Salmond's judicial test does not hold good in an inquiry into the sources of Paramountcy as it is not part of his 'Civil Law'.

The material sources of Paramountcy which have any legal value may be called, for brevity's sake, legal sources, as distinguished from 'historical' sources. These legal sources are a few. They speak with authority. But there is no agreement as to their number or relative importance. Lee-Warner speaks of the following: (1) The Royal Prerogative; (2) Acts or Resolutions of Parliament; (3) The Law of Nature; (4) Direct agreement between the parties; and (5) Usage.² The Indian States Committee were of opinion that Paramountcy was "based upon treaties, engagements and sanads, supplemented by usage and sufferance, and by decisions of the Government of India and the Secretary of State, embodied in political practice."³

Panikkar adds convention as another source. Convention in this context must be distinguished from political practice. He gives an in-

1. Salmond, *Jurisprudence*, p. 152.

2. Lee-Warner, *The Protected Princes of India*, p. 188;

3. *Indian States Committee Report*, para, 19.

stance of how conventions were beginning to be established as sources of Paramountcy. In the matter of minority administrations in States which was always a case of political practice, there could be seen no uniformity based on any ascertainable principles. The Princes were generally complaining that the Department's practice was arbitrary and capricious and urged the enunciation of some general rules. As a result of their continued protests, the Government of India passed and published a Resolution setting forth the principles concerning the administration of States during the minority of the Rulers. "This Resolution," says Panikkar, "is a good example of the conventional law as it is developing in India."¹ He adds, "Resolutions issued by the Government of India are really conventions rather than Orders of the Government."² If in a particular case, there is a Resolution in form, though ostensibly an Order, which is the embodiment of an agreement arrived at between the Princes and the Political Department, there may be no objection to regard it as a 'convention.' But generalisations are misleading. An Order of the Government of India is a unilateral act notwithstanding its being the result of a previous agreement. Therefore there is no point in adding convention to the list of the sources of Paramountcy.

The Prerogative of the Crown is one of the sources of Paramountcy. It may be regarded as an unwritten source. Halsbury defines Royal Prerogative as "that pre-eminence which the Sovereign enjoys over and above all other persons by virtue of the common law.....and comprehends the special dignities, liberties, privileges, powers and royalties *allowed* by the common law to the Crown.....It is created and limited by the Common Law. The Courts have jurisdiction to inquire into the existence or extent of any alleged prerogative."³ It is also defined as "a peculiar or exclusive privilege."⁴ Blackstone's idea of prerogative has become obsolete, in the West and no modern jurist regards the King as clothed with extraordinary

1. Panikkar *Interstate Law*,
2. *ibid.* p. 12;
3. Vol vi, 442;
4. Wharton, *Law Lexicon*;

rights and capacities' to such an extent that "the prerogative is that law in case of the King, which is law in no case of the subject."¹ To modern constitutional lawyers the old notions of prerogative appear exotic. Now-a-days, "Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative."² Where the power of the Executive to interfere with the property or liberty of subjects has not been placed under the control of Parliament, although it is ultimately liable to be so placed, it may be inferred that the source of that power is the prerogative of the Crown. "The prerogative, modified and supplemented by Statute and constitutional practice, is the source of many of the important powers of the executive throughout the Empire."³ The Paramount Power possessed a wide sphere of discretion which served as the main source of some of its powers. Whenever the Crown had to deal with the Indian States, its actions were not confined to its treaty rights only.

Holdsworth's view that prerogative is not a source of Paramountcy is not fully correct. Paramountcy rested with the Crown and was inherent in its very position. Treaties, usage and political practice do not exhaust all the sources of Paramountcy. The Paramount Power had by virtue of its prerogative, a considerable measure of executive discretion. This is like a residuary source of Paramountcy. It is well known that "In the ultimate analysis..... the Crown's relationship with the Indian States is not merely one of contract and so there must remain in the hands of the Viceroy an element of discretion in his dealings with the States."⁴ Earlier, Lord Curzon spoke of the same. He claimed that "In cases of flagrant misdemeanour or crime; the Viceroy retains the inalienable prerogative of disposition"⁵ Lord Canning's Minute of 1860 in-

1. Blackstone, *Commentaries*, i. 239;

2. *Att. Genl. Vs. De Keyser's Royal Hotel*, 1920, A. C. 538;

3. Bose, *The Working Constitution of India*, p. 22.

4. Butler Committee Report,

5. *Curzon Leaves from a Viceroy's Notebook*, p. 41;

connection with his Sannads of Adoption, is to the same effect. "The Government of India is not precluded from assuming temporary charge of a native State.", he says, and adds, "of this necessity the Governor - General in Council is the sole judge, subject to the control of Parliament."¹ Whatever might be the peculiarity of this prerogative, it is clear that it is to an appreciable extent a source of Paramountcy. It has been stated that "The powers of Paramountcy are part of the Royal prerogative; but they are peculiar because, like the privileges of Parliament, they were not created, but merely recognised by the Common Law."² But where did these powers come from? They were not created by Parliament; they were self-begotten.

The discretionary powers of the Crown, as long as they are not open to judicial inquiry, may be said to emanate from the prerogative vested in it. Certain of the rights of the Crown are traceable to this source. Panikkar complains that

The legal bases of the policy of encroachment which has converted the Indian States into an integral part of the imperial polity have been mainly, the claims of Paramountcy, Royal Prerogative; implications of treaty rights and interstate considerations."³ This statement is in the nature of an admission that Prerogative is one of the sources of "the policy of encroachment," or in other words, of intervention, if not of gratuitous interference. Certain rights were exercised as Prerogative rights and these ranged from conferring honours, dignities, salutes, stars, distinctions, and decorations, to deciding rank and precedence, and rebuking and deposing incorrigible rulers. All these Paramountcy powers were derived neither from Statute, nor from Common Law. They had their origin in the Crown's Prerogative.

Prerogative is not by itself a wide and vague thing. It is not permissible to apprehend that its classical meaning would be

1. Sastry, *Indian States* p. 141;

2. Chalmers and Phillips, *Constitutional Law* P. 687.

3. Panikkar. *The Indian States and The Government of India*, p. 424;

invoked in its modern usage. It is a groundless fear to say, "It may be urged that directly or indirectly all the powers of the Paramount Power, including those of deposing a Ruler, are derived from the Crown's Prerogative powers as described by Blackstone."¹ In modern constitutional law it would be an anachronism if one should interpret prerogative in its extensive traditional sense. Now, "it is the residue of discretionary or arbitrary authority, which at any given time, is legally left in the hands of the Crown."² Here, while speaking of Prerogative as a source of Paramountcy, its modern meaning is to be borne in mind.

The acts of the Paramount Power were, in a sense, Acts of State. They had their source in the prerogative of the Crown. Strictly speaking, "an Act of State denotes (1) an action committed against an alien outside British territory, authorised or adopted by the Crown, whose legality the courts cannot investigate; (2) the annexation, on conquest or otherwise, or occupation of foreign territory by order of the Crown.....(3) an Act done on British territory, in time of war, against an enemy alien."³ A subject of an Indian State, although not a British subject, was a British protected person, while abroad, and was therefore not an alien. The Rulers of Indian States were 'subordinate allies.' Thus there could be nothing like an Act of State of the Paramount Power in its dealings with the Indian States. But as the acts of the Crown are not justiciable and derive their validity from the prerogative powers, they may, on the grounds of analogy, be regarded as Acts of State.

A clear distinction exists between acts of Prerogative and Acts of State. "Prerogative properly describes the power and authority of the King in relation to his own subjects, and not rights vested in him in relation to persons owing no allegiance to him."⁴ Can it be said that the Crown's acts towards the Indian Princes who owed allegiance to it were included in Prerogative and its acts towards the

1. Sastry, *Indian States*, p. 158;

2. Dicey, *Law of the Constitution*, p. 424.

3. Ridges, *Constitutional Law*, p. 31;

4. Per Warrington, J. In *re Ferdinand*, (1921) 1 Ch. p. 139.

subjects of the States who owed no allegiance to it, were Acts of State? This splitting up appears fanciful. It has been said : "The acts of the Crown in foreign affairs are described as acts of State and the term is used of them exclusively. The distinction is not altogether easy to defend, for there seems little doubt that all acts done by the discretionary authority of the Crown, other than those authorised by statute, are of the same legal nature, whether they are performed within or outside the realm. Whereas in respect of acts done within the realm, the Courts are not obliged to abandon jurisdiction at the mention of Prerogative, they cannot enter or inquire into the validity of an act of State."¹ It has also been judicially determined that "Acts done by the Crown in relation to the Indian States in exercise of its powers vested in it as Paramount Power (that is by virtue of its Paramountcy) are acts of State."² Thus it might be noticed that the wide discretionary authority of the Crown which is in the nature of Prerogative serves as a source of many of its acts which are akin to acts of State. "An act of State is essentially an exercise of sovereign power..... Acts of State are not all of one kind. For example, an act of State may fix the relations between two States, each of which continues to possess an independent existence An instance of such an act of State may be found in the case of the *Nabob of Carnatic Vs East India Company*, (1793) 2 Ves 56." ³ As 'all acts of the Crown in its discretion are of the same legal nature' the distinction between its domestic and foreign acts is not of much importance as far as its dealings with Indian States went, for they were in a peculiar position; the dealings of the Crown with them were neither 'foreign' much less 'domestic' Prerogative may be used in a liberal sense as including the Crown's jurisdiction outside the realm.

The jurisdiction of the Crown outside the realm is the outcome either of legislative sanction behind it or of its inherent right as

1. Keir & Lawson, *Cases in Constitutional Law*, p. 293;
2. *Secretary of State for India Vs Kamachee Baisaheb*, 13. (1859) M. P. C. 22;
3. *Salamán Vs Secretary of State for India*. (1906) 1 K. B. 639.

sovereign. The Crown exercises its extraterritorial jurisdiction by means of Orders in Council. What is the source of this authority? Commenting on Holdsworth's dicta, Bhattacharya says, "It is surprising to find that prerogative is not the source of Paramountcy, but that the growth of Paramountcy has added a new and distinct prerogative." One may as well pause and ask, does Holdsworth regard the converse as true, that is, that Paramountcy is the source of Prerogative? "There is no warrant for the proposition for treating Paramountcy of the Crown as a class apart from other prerogatives.....Since when did the King of England become vested with Paramountcy? Was it inherent in the Kingship of England or was he clothed with it without the Parliament knowing it?"¹ The point to be noted here is that the King had no special 'Paramountcy prerogative' and his ordinary prerogative was one of the sources of Paramountcy. Like Paramountcy itself "the determination with anything like legal precision of all the prerogatives of the Crown in India, is by no means an easy task."² Acts of Paramountcy are like acts of State having their source in prerogative. "The relations between the Paramount Power and the Indian States are.....called acts of State, incapable of being questioned or inquired into by any municipal courts as such courts have neither the means nor the power of enforcing any decision which they may make."³ Whether acts of State are the outcome of Prerogative or not "the list of obligations which, irrespective of their treaties, had devolved on the Indian States through the Royal Prerogative, includes the right of the Queen's Viceroy (1) to recognise (all) successions, (2) to assume the guardianship of minor Princes, (3) to confer or withdraw titles, decorations and salutes, (4) to sanction the acceptance of Foreign Orders, (5) to grant passports, and (7) to recognise and appoint consular officers."⁴

1. Bhattacharya, *The Indian Constitution*, p. 95;

2. N. Rajagopaliengar, *Government of India Act*, p. 11.

3. Sirdar Ranbir Singh, *Legal Problems in Indian States*, pp. 60-61;

4. Lee-Warner, *Protected Princes of India*, p. 188.

The law of natural justice is regarded as one of the unwritten sources of Paramountcy. Lee-Warner says: "It may appear fanciful to give prominence to a law of nature as a source of obligation devolving on the Native States The Company preferred to condemn certain practices as "opposed to principles of natural justice and humanity," such as 'cutting off ears and noses,' 'extracting eyes,' 'mutilating,' 'impalement, suttee, infanticide, and slavery.'¹ The officers of the Company successfully claimed the right to exercise necessary powers to suppress what they regarded as barbarous practices, whether there was an agreement or not on the part of the State in regard to such a right of intervention. In a few treaties, special obligations are imposed on the Princes that they should exert themselves to eradicate some of the social abuses or evils. When cruel and inhuman practices had to be exterminated the Crown was obliged to intervene in the domestic affairs of the States notwithstanding treaty terms. The Crown based its claims on the principles of equity and justice. As pointed out by the Indian States Committee, the Crown would "intervene to suppress barbarous practices, such as *sati* or infanticide, or to suppress torture and barbarous punishment."²

Even in international law a right of intervention exists when human rights are unjustifiably violated by one of the States. "If the right of intervention in internal affairs can be exercised by one State against an independent and sovereign State, it can be exercised more justifiably against a protected State by the protecting State."³ That principles of natural justice are recognised in international law as a source of rights and obligations in regard to the dealings among States *inter se*, is evident from the following observations. "When a Government, although acting within its rights of sovereignty, violates the right of humanity, either by measures contrary to the interest of other States, or by an excess of cruelty and injustice which is a blot on civilisation, the right of intervention may lawfully be exercised,

1. Lee-Warner, pp. 191-193.

2. *Indian States Committee Report*, para 53;

3. Sen, *The Indian States*, pp. 174-175.

for, however worthy of respect are the rights of states' sovereignty and independence, there is something still more worthy of respect, and that is the right of humanity, which must not be outraged."¹ Again, "Where a State under special circumstances, disregards certain rights of its own citizens, over whom presumably it has absolute sovereignty, other States of the family of nations are authorised by International Law to intervene on the grounds of humanity. When these human rights are habitually violated, one or more States may intervene in the name of the society of nations."² Thus it may be seen that 'principles of humanity' are recognised as a source of authority to intervene in the affairs of a State even under International Law. What is a source of international authority, is certainly a source of Paramountcy, for, in the latter case there is already an inherent superiority of the protecting State and a clear denial of independence and full sovereignty to the protected States. How intervention was resorted to on the ground of 'humanity' despite treaty pledges, will be described later. The old legal maxim *Salus populi suprema lex*, that is, 'regard for public welfare is the highest of laws', has been the basis of many powers of Paramountcy and has considerably relegated the treaties to the background.

According to Lee-Warner, Acts or Resolutions of Parliament were one of the sources of Paramountcy. There are some Acts of Parliament which have a bearing on the relations between the Indian States and the Crown. Normally Parliament does not directly legislate for non-British subjects and territories which are included in the Empire as dependencies and protectorates, and not as possessions under its direct sovereignty. The Indian States were not under the immediate control of Parliament. Their territories were not British dominions and their inhabitants were not British subjects. They lay outside the ambit of Parliamentary legislation. As Halsbury says: "The inhabitants of an Indian State are not British subjects properly.

1. Payn, *Cromwell on Foreign Affairs*, p. 72;
2. Stowell, *Intervention in International Law*, p. 57.

so called,.....they are not amenable to ordinary British jurisdiction.”¹

The word ‘ordinary’ is quite significant. In *Emperor Vs J. R. Tewari*, Criminal Revision Case No. 128 of 1925, under the ‘Foreigners’ Act of 1915 concerning a subject of the State of Benares, their Lordships of the High Court of Bombay “readily took it for granted that one who is the subject of an Indian State cannot, at the same time, be the subject of the British Government and that he is therefore necessarily to be treated as an absolute ‘foreigner’ liable to be expelled from British India.”² But it cannot be said that the subjects of Indian States are ‘aliens,’ that is, “subjects of a foreign State who have not been born within the allegiance of the Crown.”³

How is it that Lee-Warner considers Acts and Resolutions of Parliament as a source of Paramountcy? It is a fact that Parliament is more than a legislature of the United Kingdom with its normal jurisdiction limited to territories under the direct government of the Crown. The term ‘British dominions’ is wide; it means and comprehends “all countries subject to the Crown.”⁴ Are not the Indian States ‘subject to the Crown’? The British Parliament is an Imperial Parliament as well. The Royal Titles Act⁵ speaks of Her Britannic Majesty as the Empress of India as a whole, and not merely of British India. The title of the Paramount Power is itself derived from a Parliamentary statute. The Interpretation act of 1889⁶ mentions the exercise by Her Majesty, of ‘Suzerainty’ over the Indian States. As the highest legislative body of the Empire which was “a composite State counting the Indian principalities among its component members and having His Majesty at its head”⁷, Parliament could both confer and control Paramountcy powers. Parliament has time and again asserted its rights to legislate

1. Halsbury, *Laws of England*, Vol. I, p. 586;
2. Gundappa, *The States and their People*, p. 17;
3. Halsbury, *ibid.*, Vol. 1, p. 302.
4. Dicey, *Conflict of Laws* p. 68;
5. Act of 1876, 39 & 40, Vict c. 10;
6. 1889, 51 & 52, Vict. 63;
7. Gundappa, *The States and their People*, p. 19.

extra-territorially when exigencies demanded such a course. As Ilbert puts it, "Parliament does not legislate (for other territories within the Empire) except on matters which are clearly *imperial* in their nature."¹ 'Does not' is not 'cannot', and Paramountcy is nothing if not 'clearly imperial in nature.' If Indian States, affairs did not figure prominently in Parliament, it is because "discussion of such subjects is discouraged for reasons of expediency and policy of state, and not on account of any legal incompetency of Parliament."²

Where Parliament, in exercise of its extra-territorial jurisdiction over British subjects and officials resident in the Indian States, made laws for them, the Indian States got affected in some way or the other. The claim of the British Parliament to legislate for British subjects while in foreign countries necessarily reacts on those with whom such persons have dealings. Lee-Warner cites Statute 37 Geo. iii. cap. cxlii, s. 28 which imposed a restriction in 1797 in respect of lending money to the Indian Princes. "It was ordained that from the 1st of December 1797, no British subject was to lend any money for native Princes without the consent of the Court of Directors or the Governor in Council; The protected sovereigns of India, in whose interests a misdemeanour was created, became bound not to abet a crime even without the conclusion of any treaty or engagement with them for that purpose."³ Such measures resulted in placing restrictions not only on the lending of money by the British subjects, but also a corresponding restriction on the Princes' sovereign right to borrow. A serious legal disability was the consequence which they had to suffer. Parliament proceeded to stop not merely indiscriminate borrowing by them; it indirectly paved way for intervention in case such rules were violated. They could not deal with their States freely. "The British authorities systematically declined to allow the petty chiefs to encumber their States beyond their own lifetime, or to make any charges upon them beyond their own life interests therein."⁴ This legislation and the resultant

1. Ilbert, Sir Courtenay, *Government of India*, p. 372;

2. Gundappa, *ibid.* p. 26.

3. & 4. Lee-Warner, *The Native States of India*, p. 197

powers exercised by the British officers, have served as a source of Paramountcy. Although primarily on the ground that lending money to the Indian Princes was productive of much mischief, and "was a source of misery and extortion", Parliament enacted preventive laws regulating the conduct of British subjects; such laws had repercussions on the Indian States. A few powers comprised in Paramountcy may be said to have had their mediate source in some Parliamentary enactment.

It is necessary to see how far the treaties, in the light of actual practices, were the sources of Paramountcy. One may venture to describe them, to some extent, as the fruit of Paramountcy as well. The Paramountcy of the Crown was most in evidence in the sphere of intervention. Treaties had been many a time disregarded. Was Paramountcy by itself a source of rights and obligations? Sir Leslie Scott protested: "If Paramountcy was a source of rights there would be no limit save the discretion of the Paramount Power..... We regard the idea that Paramountcy as such creates any powers at all, as wholly wrong, and the resort to Paramountcy as an unlimited reservoir of discretionary authority over the Indian States, is based upon a radical misconception of what Paramountcy means. The existence of general discretionary authority is wholly inconsistent with the pronouncements of the Crown"¹ But what about practice? The opinion of the learned counsel for the Princes did not find favour with the Indian States Committee. It has been appropriately remarked that "Throughout the course of its rise to power, there is no evidence that the British Government has at any time taken a limited view of its responsibilities (rather rights) towards the States. On the contrary it has always asserted and employed Paramountcy as a source of rights."² The Paramount Power had, as a result of exercising its rights of intervention, converted its Paramountcy into an additional source of its own authority. "Where intervention is sometimes permitted by treaties

1. Opinion of Counsel for Princes, para, 3-(d);
2. Kulkarni, *Future of Indian States*, p. 55;

with the British since then were with the Parliament through the Company and not with the Crown.

There are few events of any political importance during the century as far as the Company is concerned. In fact no one could foresee the political fortunes of the British "in the history of the East India Company in its purely commercial period, which occupied the century and a half from 1600."¹ The Company owed allegiance to the Moghal Emperor, and its members were described as merchants and its strongholds, as factories. Although it possessed the right to "acquire territory, fortify their stations, defend their property by armed forces, coin money and administer justice" within their own settlement,"² it had not attained the status of a territorial power. Indo-British commercial relations commenced with the seventeenth century, but it took a long time for the flag to follow the trade. A detailed narration of how it happened is extraneous to the purposes of this study. There is no controversy about the fact that "The East India Company... became a territorial power in an almost accidental way in the middle of the seventeenth century."³ The territorial expansion of the British does not synchronise with the growth of Paramountcy; it is anterior to it. But both are closely related. Paramountcy did not begin with Lord Hastings. A vast spadework had been done for over two centuries. At the same time it would be inaccurate to say that British sovereignty and Paramountcy grew side by side. It is true "the Company had become by 1805 the indubitable paramount power of India, the inheritor of the Mogul Empire."⁴ But it is not true that Paramountcy was established by the Marquis of Wellesley. It was to be done a score of years later.

For a long time the Company had no intercourse with the Indian Princes directly. As the Moghul power declined consequent on the death of the last Great Moghul, the Company could make itself felt

1. Ramsay Muir, *The Making of British India*, p. 19;

2. Joshi, *op. cit.*, p. 9.

3. & 4. Ramsay Muir, *op. cit.*, p. 19 & p. 204.

In Indian political life. It not only consolidated its possessions; it embarked on a career of enterprise. There are certain events in the eighteenth century which prefigure the shape of things that were to come. Whatever might have been the vicissitudes which the British had to suffer before their efforts successfully ended in the establishment of their sovereignty over British India and Paramountcy over the Indian States, the legal position of a few representative States at least, prior to their falling under the British sway, needs an examination. The legality of the many contentions of the Princes may be tested in the light of undisputed historical facts.

The Company pursued a halting and hesitant course for a long time. By the middle of the eighteenth century it became a "King-Maker, having power without responsibility." "Between 1750 and 1765 the East India Company, without desiring or intending any such result, found itself in the position of the controlling power in two important regions of India, the Carnatic and Bengal."¹ The rivals of the British had already started the game of courting the favour of local powers. The Company had no choice but to use to its advantage situations highly favourable. The defeat of, and treaty with, Siraj-uddaula dated February 9, 1757, mark the beginnings of a new era. That the British were inclined to consolidate their acquisitions and proceed on a career of expansion is indicated by one of the articles of the treaty which runs thus: "the Company shall be allowed to fortify Calcutta in such a manner as they shall esteem proper for their defence, without any hindrance or obstruction."² On Siraj-uddaula's alleged breach of the treaty, war with him was renewed; he was overthrown in the Battle of Plassey and Mr. Jaffar was placed on the throne of Bengal. Mir Jaffar not only agreed to comply with "whatever Articles were agreed upon in the time of peace with the Nawab Siraj-uddaula", he made over huge sums of money as reparations and also ceded some tracts of territory to the Company. On September 27, 1760 the Company made a new

1. Ramsay Muir, *ibid.*, p. 34.

2. Aitchison's, Vol. 1., P. 181 N. B. References to all treaties in Aitchison's Collection.

treaty with Mir Khasim, son-in-law of Mir Jaffar, whom it wanted to place on the Bengal throne. The treaty is one of "firm friendship and union" containing several articles stipulating mutual assistance and so on. The third article speaks of common friends and enemies; the fifth is the most important one as it mentions the cession of three large districts to the Company. It says: "The lands of Burdwan, Midnapore, and Chittagong shall be assigned, and sannads for that purpose shall be written and granted." "These new provinces were not directly administered, but their Zamindars or revenue-collectors paid the revenues to the Company. This arrangement is the first instance of a method of providing revenue for the maintenance of military forces which was to be much used later and was to form one of the main features of 'subsidiary alliance.' Clause 8 and 9 show that the Company's territories were treated as a practically independent state."¹

Events moved fast during the following years. Mir Khasim was in turn replaced by Mir Jaffar and on the death of the latter a boy-Nawab, Najm-uddaula, was put on the throne of Bengal. As the Nawab-Vazier of Oudh, Shuja-uddaula, had taken up the cause of Mir Khasim, he was utterly defeated in the battle of Buxar (1764). The most memorable event is the grant of the *Diwani* of Bengal, Behar and Orissa to the Company by a royal Firman from the Emperor Shah Alam, dated August 12, 1765. This *Diwani* was to be "in possession of the Company, from generation to generation, for ever and ever." The Nawab of Bengal agreed, by an instrument dated September 30, 1765, to accept a certain sum "as an adequate allowance for the support of the Nizamat" and waived other claims. Before this is a tripartite treaty, also between the Nawab of Oudh, the Nawab of Bengal, and the English Company, dated August 16, 1765. This one anticipates later treaties of "perpetual and universal peace, sincere friendship, and firm union." With the assumption of the *Diwani*, the Company acquired a *de jure* status and established itself as a ruling power, albeit

1, Muir, *ibid* p. 66:

its subordination to the Mughal Emperor who reigned at Delhi for several scores of years subsequently. The victories of the Company "led to the military subjugation of Bengal. The grant of the *Diwani* furnished a *de jure* basis for the exercise of British authority in Bengal, Behar, and Orissa, an authority which had already been established *de facto* there, some time before"¹ It was from this time onwards that the Company, conscious of having become a political power, began "to look out for friends and helpers among the local potentates; and its policy towards them had then to be one of fraternizing, ingratiating, and reciprocity."² In the year 1767, as per Charles Townshend's Act, there was a "temporary agreement" between the "United Company of Merchants trading to the East Indies" and His Majesty "in relation to the territorial acquisitions and revenues lately obtained,"³ by the former. According to this a certain sum was annually made payable by the Company to His Majesty's exchequer. The Company appears as a political power contracting with the Home Government.

Although the Company gained a legal status after the battle of Buxar, it had, a few decades before the event, begun some intercourse with the Indian States. As early as in 1723, there was a treaty with Travancore according to which the State agreed to be "in league and united in friendship" with the Company. In the year 1730, "a treaty of offensive and defensive alliance against the Kanoji Anglia," the piratical chief of Kolaba, was concluded between the Company and the Sirdesai of Sawantwadi. A few years later, in 1733, "a treaty of general alliance and specially against piracy" was negotiated between the Company and the Ruler of Janjira. A very important relationship was established with the Peishwa Baji Rao in 1739 by means of a "maritime and commercial treaty." All these are pre-Plassey treaties. They illustrate what kind of contact prevailed between the Indian States and the Company which was to become a Paramount Power in three quarters of a century.

1. Ramaswamy, *The Law of the Indian Constitution*, p. 14
2. Gundappa, *The States and their People*, p. 45;
3. 7 Geo. iii cl vii.

But these treaties are not either in content or tone anticipatory of post-Plassey treaties which are the groundwork of Paramountcy.

The long period of relations between the British and the Indian States can be broadly divided into two - the first from 1764 to 1813 and the second from 1818 to 1935. The former can be regarded as a pre-Paramountcy era. It was in that period that foundations were laid. Lee-Warner subdivides the second period into two parts - the one before 1858 and the other after. Before the advent of Lord Hastings, Paramountcy may be said to have been in its pre-natal state. It was during his Governor-Generalship that it commenced its active career. The division of epochs is made for purposes of convenience. They are not strictly exclusive periods. Chronological arrangements facilitate quick comprehension of the life of institutions; but they are not infallible. It is some predominant characteristic that is taken as the index of each period. While tracing the evolution of Paramountcy the distinct features of each period will be indicated. As for the policy of the Company before 1813, it was first one of security and non-intervention. This, by slow degrees, gave place to the system of subsidiary alliances and occasional intervention.

Reference has already been made to the treaty with Oudh dated August 12, 1765. This may be considered as the first landmark in the history of the Company's dealings with the Indian States. In preference to the annexation of the Nawab's territories, which step was both possible and lawful, the Company decided to keep the Nawab and his possessions going. The Company undertook to defend the frontiers of Nawab Shujah-uddaula's dominions on condition that he defrayed the expenses involved. Lee-Warner remarks that this "marks the first step in the attempt which guided the Company in their foreign policy for nearly half a century to enclose British interests in a ring-fence and to remain passive spectators of what might go on beyond it."¹ It was a passive creed of unconcern, of waiting and seeing, while preserving buffer states in the border. Lord Clive realised the wisdom of adopting a friendly attitude towards

¹ Lee-Warner, *The Native States of India*, p. 42;

the Indian Powers. He pursued a policy of prudence; "he sought the substance, although not the name of territorial power, under the fiction of a grant from the Mughal Emperor." ¹ It was during this period that some far-reaching relations were forged. Under a treaty dated 12th November 1766, the Company gained the fertile Northern Circars from the Nizam and also as undertaking that he would be their ally. It was just then that the Nizam had thrown off the Delhi yoke.

Warren Hastings, the first Governor-General of India, followed the policy of his illustrious predecessor. As the official chronicler records it, "Like other British administrators of his time, he started with a conviction of the expediency of ruling with the aid of the Native Powers" ² The work of Warren Hastings constitutes the real establishment of the British power in India. But he did not favour a policy of territorial expansion; he was for consolidation and administrative reform. It is remarkable that under him "the British power in India, without materially extending its limits (the only acquisition being the zamindari of Benares, ceded by Oudh, by a treaty which he opposed), had in the course of a double war with the Mahrattas and Hyder Ali, established its position as the most formidable power in India." ³ Imperceptibly a change was coming over the relations with the Indian States. There are premonitions of Paramountcy in the treaty with Cooch Behar, 1773. This treaty is more than a simple instrument of alliance; there is an admission by the State of its subjection to the Company.

Lord Cornwallis who came next was wedded to a policy of non-intervention. This was in pursuance of Pitt's India Act, 1784, which discouraged the schemes of intervention. Section 34 of the Act clearly says: "To pursue schemes of conquest and extension of dominion in India, are measures repugnant to the wish, the honour

1. *Imperial Gazetteer*, ii, p. 479.
2. *Imperial Gazetteer*, ii, 482;
3. Muir, *op cit* p. 103;
4. 24 Geo. 111. cap. xxv.

and policy of this nation It shall not be lawful for the Governor-General and Council either to declare war or commence hostilities, or enter into any treaty for making war against any of the country princes or states in India."¹ But absolute non-intervention in Indian politics, as was contemplated by section 34 of the India Act of 1784, was impossible. Lord Cornwallis was dragged into the whirlpool of South Indian affairs. Tipu Sultan attacked the Raja of Travancore who was an ally of the Company. The Company could no longer continue its attitude of abstention from the exercise of its influence among the Indian States. Lord Cornwallis lost no time in realising the "unavoidable inconvenience of the system of neutrality"² and formed a combination against Tipu. He thereby abandoned his old policy to escape a highly embarrassing situation; but there was no final repudiation of the policy. Sir John Shore who succeeded Cornwallis likewise preferred a policy of aloofness. He is reputed to have had "an excessive dread of entanglements."³ The "advocate and director of the policy of non-intervention,"⁴ namely Cornwallis, had to face a dilemma; the choice lying between loyalty to his policy and fulfilment of treaty obligations. Shore was spared such awkward or compromising situations. To remove all doubts of the Government regarding its policy towards the Indian States as there had been some deviations from it, Parliament repeated its old injunction by an Act in 1793.⁵

The treaties of this period speak of 'reciprocal friendship' and 'mutual alliance'. The Company was struggling for bare existence and saw in the Nizam and the Mahratta Chiefs independent States with resources equal to or greater than its own. The policy impressed upon the Company by Parliament and by the Company on its Indian servants was to avoid increasing the Company's

1. *ibid.*

2. Muir, *ibid* p. 180;

3. *Imp, Gaz.* ii, 488;

4. Lee-Warner, *Protected Princes*, p. 90;

5. 33 Geo. iii, c. 52, S. 42.

dominions."¹ So it was natural that the Company should have preferred to remain in isolation. "During the first period of their connection with the Native States, the British endeavoured, as far as possible, to live within a ring-fence."²

Circumstances were rapidly changing when, in 1798, Wellesley assumed office as Governor-General. He adopted a fast policy. He represents a "very important stage in the development of British power, a stage which has been summarised in the phrase that under his direction the British Empire *in* India was transformed into the British Empire *of* India."³ The Company was obliged to meet unexpected eventualities. "The British power in India, in the midst of States which were in perpetual unrest must fight in self-defence if not in aggression, and found that it was faced by the alternative of expansion or destruction."⁴ Wellesley readily chose the former. He was convinced that the best security was a bold policy of intervention. "The policy of non-intervention was made impossible by the facts of international politics in India."⁵ Panikkar prefers to call this policy one of 'neutrality' for, according to him, "It would be wrong to call it non-intervention."⁶ The distinction, though not material, may be permitted because there was yet no Paramountcy involving a right of intervention.

The last two years of the eighteenth century witness a radical change in the policy of the Company. The Marquis of Wellesley "determined to establish the ascendancy of the British power over all other States in India by a system of subsidiary treaties, so framed as to 'deprive them (the Indian States) of the means of prosecuting any measure or of forming any confederacy hazardous to the security of the British Empire, and to enable us to preserve the tranquility of India' by exercising a general control over the restless spirit of

1. Holderness, *Peoples and Problems of India*, p. 197;

2. Lee-Warner, *Protected Princes*; p. 42;

3 & 4. Muir, *op. cit* p. 199 & 200;

5. Ruthnaswamy, *British Administrative System*, 'p. 594;

6. Panikkar, *British Policy towards Indian States*, p. 27.

ambition and violence which is characteristic of every Asiatic Government." ¹ His settlement of Mysore affairs after the defeat and death of Tipu in 1799 is a momentous achievement. On the conclusion of the last Mysore War the Company became the undisputed master of the southern peninsula. Although Mysore was restored to the old dynasty, the position of its ruler was reduced to one of extreme subordination. The giving back of the State, which was actually conquered by the Company and its allies, was an act of generosity or expediency. The Mysore treaty is reflective of the altered position of the Company. If it is read along with other treaties such as those with the Nawab Vazir of Oudh, the Raja of Travancore or the Nizam, the disparities appear striking. The Company reserved for itself the most extensive and indisputable rights of interposition in the internal affairs of the State. It also acquired an unlimited power of resuming the direct administration of the State. The chronicler, speaking of "the restoration of the descendant of the Rajas of Mysore to the sovereignty, under British protection, of a part of the dominions," cites the remarks of Major Wilks, "The settlement of Mysore was distinguished from all preceding measures of British policy.....Powers of interposition in the internal affairs of the Government.....were reserved by a special provision of the treaty. The experiment was new, and with reference to its remote consequences, of utmost importance." ² It did prove far-reaching. This 1799 treaty is the first one which secured to the Company a most formidable weapon of Paramountcy, the right of intervention. In dealing with other powers also, Lord Wellesley had, as his supreme idea, the establishing of British pre-eminence. He treated the Peshwa and the Mahratta chieftains separately. He thereby made it easy for the breaking up of the Mahratta confederacy without which British paramountcy was an idle dream.

There are a few treaties concluded by Wellesley which may be noticed collectively. They are with Oudh, Hyderabad, Cochin, Travancore, Poona, Coorg and Baroda. They were negotiated

1. *Imperial Gazetteer*, vol. ix, p. 10.

2. *Rice, Mysore Gazetteer*, vol. vii, p. 419.

round about 1805. They are all on the footing of mutual alliance. It is worth noting that the States which were parties to these are recognised as possessing independence and sovereignty. There does not appear to be any intention on the part of the Company of claiming overlordship. There are no indications of any desire to encroach upon the privileges of the Princes. They were assured of protection against external aggression and internal rebellion. The States were obliged to retain subsidiary forces and give up the rights of foreign relations. Absolute internal sovereignty was guaranteed. Only Mysore constitutes an unhappy exception. Panikkar says: "All the treaties, that is of subsidiary alliances before the advent of Lord Hastings, except that with Mysore, were negotiated on a basis of equality. The Company did not claim any Paramountcy or authority and the treaties themselves show that at least in the case of those States which were not conquered, there was a spirit of reciprocity."¹ This statement is substantially true and confirms the view of Barton that "in almost every case, negotiation was on the basis of equality between the contracting parties."² The treaties of this period have some qualities of international covenants. "During the eighteenth century treaties with the States were made on a basis of equality; hence the relationship has a quasi-international character."³ They are replete with such expressions as "mutual amity, reciprocal obligation, friendly co-operation, true friendship, good understanding, perpetual friendship, firm alliance" and so forth. Referring to the Marquis of Wellesley's despatch to Tipu, Fenner Brockway says: "The treaties with the States at this period were based on reciprocity; to outbid the French the British were prepared to allow the Rulers to maintain armies and to make treaties independently with other Princes. But when the fear of the French had gone, the tone of the British had changed. The treaties of the first half of the nineteenth century were no more reciprocal; they

1. Panikkar, *British Policy towards Indian States*, p. 37;
2. Barton, *The Princes of India*, p. 247;
3. Chalmers and Phillips, *Constitutional Law*, p. 492.

represented domination and subjection."¹ In many treaties there are good-behaviour clauses subtly interlaced. Where the British had to deal with a strong adversary, the terms of treaties are liberal. The treaty with Sindhia, concluded in 1803, provides that "accredited ministers from each shall reside at the Court of the other." This is not so in their treaty with the Holkar Maharaja a couple of years later. In fact one can easily discern the change of policy in the series of treaties read in a sequence. Although the last bulwark against British expansion disappeared in 1818 on the fall of the Peishwa and Paramountcy over the Indian States was reared on the ruins of the Mahratta Empire, there was already, on the appearance of Lord Hastings on the Indian scene, clear evidence of Britain's *de facto* Paramountcy. On this score it is held that "The year 1813 marks the dividing line between the earlier theory of the relations of the allies to each other and the later theory and practice of the relationship between the Paramount Power and the subordinate allies."²

All the various incidents prior to 1818 may be regarded as the material out of which Paramountcy was moulded. Of course it would be wrong to say that it appeared just in 1818. Like Rome, it was not built in a day. It must however be stated that British Paramountcy dates from 1818 when the Peishwa fell. "The assumption of the position of the Paramount Power by the British must be dated to the Governor-Generalship of Lord Hastings. Previous to that the British had been the strongest power in India, but no more. From Lord Hastings's time, a different principle underlies their acts and policies, a responsibility inherent in the exercise of an imperial power."³

The Indian States were not entitled to be treated as independent and sovereign. "Most of the bigger States may be described as succession States to the Moghal Empire, founded by military adventurers in the seventeenth and eighteenth centuries in the anarchy that follow -

1. Fenner Brockway, *The Indian Crisis*, p. 67;

2. Julian Paliner, *op. cit.* p. 25.

ed the decay of Moghal rule,"¹ says Barton and gives the examples of Baroda, Gwalior, Indore etc. But these States acknowledged the overlordship of the Peishwa. It has been held: "The Indian States are survivals of former dynasties and powers which.....continued to prolong their existence after the collapse of the Moghal Empire.....Some of them.....had been able to establish themselves in a position of *practical* independence, yielding only a nominal allegiance to the Emperor of Delhi and were able later to secure recognition from the British Power. Others of them.....were rescued from extinction by British intervention."² But it is clear that no State which is in existence now was independent and sovereign before accepting British Paramountcy. There were three sovereign powers which were vanquished. "Some States were rescued, some disappeared after challenging unsuccessfully the British Government, others through their own inherent weakness and corruption, others again through the failure of natural heirs and the application of the doctrine of lapse."³ Again, "It is not in accordance with historical fact that when the Indian States came into contact with the British Power, they were independent. Nearly all of them were subordinate or tributary to the Mughal Empire, the Mahratta Supremacy, or the Sikh Kingdom."⁴ Even those States which were under none of these three were at one time or the other conquered or annexed. It was argued by the Indian Princes that this was an inaccurate proposition. With reference to States like Travancore particularly, which lay far beyond the geopolitical influence of any of the powers above mentioned, it was contended that the view of the Committee was unacceptable. But it must be said that the Committee were considering the general position of the Indian States. They said that 'nearly all of them' and not all of them.

1. *India's Fateful Hour*, p. 29.

2. Sir Benjamin Lindsay, *Journal of Comparative Legislation and International Law*, Feb. 1938, p. 91;

3. *Davidson Committee Report*, p. 262.

4. Indian States Committee Report, para 39

It is true that a State like Travancore was under none of the three overlordships. It does not follow that it 'ever held an international status'. If it is claimed that it was neither conquered nor annexed, does it mean that all the other States were either conquered or annexed? Even in the case of Travancore it might be pointed out that it had lost its independence when overrun by Tipu. It was not 'conquered or annexed' then. But it approached the British, like a suppliant, for help and protection. The Raja of Travancore assumed more the role of a distressed petitioner than of an independent and self-reliant monarch. "The State was extricated from the clutches of the Sultan of Mysore, by its entry into the subsidiary system." ¹ Even if it had enjoyed a position of unconquered independence at some time, it lost it in 1809. This is a relevant date to fix the status of Indian States. According to article 9 of the treaty of 1805, the Maharaja had promised to pay "at all times the utmost attention to the advice of the English Government." The treaty also stipulated that the Company could assume the Government of the State "if the subsidy should not be regularly paid." British control was resented. Travancore and Cochin combined to offer armed resistance. But "A military force was dispatched and the rising was quelled with excessive severity" ² Is it not an answer to Sir C. P. Ramaswamy Ayyar's boast that Travancore was never conquered? As Pyarelal says, "It is idle to pretend in the face of this that treaty relations are as between two sovereigns." "Two South Indian States, Mysore and Travancore, which might have claimed an independent derivation of their authority, had been brought by conquest under the Company's suzerainty," ³ says Thompson. Even Mayurbhanj which is claimed to have been independent "was originally under the suzerainty of the Emperor of Delhi, as is evident from the *Firman-i-Shahi* issued by the Emperor in 1724" and also "from the payment of tribute." ⁴

1. Pyarelal, *Status of Indian States*, p. 27;

2. Wilson, *History of India*, 256-257;

3. Thompson, *op. cit.*, p. 278.

4. Sen, *op. cit.*, p. 88.

CHAPTER X

Evolution of Paramountcy.

That Lord Hastings entered office with the avowed object of completing Wellesley's work is evident from what he wrote within a year after coming to India. "Our object ought to be to render the British Government Paramount in effect, if not declaredly so." He pursued an active policy and "negotiated more treaties than any other ruler of India either before or after 1813."² He is entitled to the credit of being regarded as the arch-architect of Paramountcy. It was he who removed the last obstacle to British ascendancy. His victory in the last Mahratta war was crowned by "the destruction of the Mahratta confederacy, the annexation of nearly all the Peishwa's lands and many of those of other princes, and the bringing of the remaining Mahratta rulers definitely under British suzerainty. It also led to the establishment of a protectorate over the little Rajput and other states of the North-West, and brought the boundary of the British Raj to the Sutlej and the Indus."³

For a lawyer Lord Hastings's regime is very important as it was during this period that the problem of the Indian States was "removed from the province of international law and transferred to that of the practical statesman and the political philosopher where it has rested ever since."⁴ British policy towards the Indian States was adjusting and its "shifting from an international to an imperial plane is clearly indicated from the administration of Lord Hastings."⁵ It is described as that of 'subordinate isolation.' Opposed to annexation, he was at the same time keen on securing some political settlement which should finally remove all doubts about the claims of the Princes to be treated in terms of international law. He declined to do the customary

1. *Private Journal of the Marquis of Hastings*, p. 54 Vpl. i;

2. Lee-Warner, *Protected Princes*, p. 93;

3. Muir, *op. cit.* p. 249;

4. Mehta, *op. cit.* p. 262;

5. Sastry, *Indian States*, p. 19.

obesiences to the Emperor. "He refused to visit the King (of Delhi as the British preferred to call the Emperor), since the King was unwilling to be visited except, as a suzerain" ¹ and there could not be two suzerains! He went to the length of stopping *nazars* till then presented on occasions. He said: "This custom (nazars) I have abrogated; considering such a public testimony of dependence and subservience as irreconcilable to any rational policy." ²

On the fall of the Peshwa who "for himself and for his successors, recognised the dissolution in form and substance of the Mahratta Confederacy, renouncing all connection with the Mahratta Rulers." Hastings turned his attention towards the task of consolidation. He could sit neither safe nor contented in the ring-fence. By means of engagements he created strong and friendly relations with many Indian States. A number of principalities were rescued from the wreck that followed the collapse of the Mahratta Empire. He brought Central India, Rajaputana, and Cutch under the protection of the Company. Lee-Warner says: "The administration of Lord Hastings was equally remarkable for the wars he fought, for the treaties he negotiated, and for the settlement he made. But it is often forgotten that he was a King-Maker as well as a treaty-maker. Isolation was the keynote of his policy." ³ It has been rightly remarked that "In this phase, the Indian States were isolated from the outer world, and also from each other, with some fluctuations and uncertainty of reasonings, a *positive Paramountcy* was developed and the sense of the responsibility of the British for the condition of the whole peninsula grew to maturity." ⁴ It is on this ground that Lord Hastings deserves to be called the father of Paramountcy. It was his object to render the Indian Princes incapable of self-defence. But he did not like to prove meddlesome; for intervention to him was 'a breach of faith' and he sarcastically characterised solicitude for the welfare of the subjects of mis-governed:

1. Thompson, *The Making of the Indian Princes*, p. 213;
2. Hastings's *Journal*, 22-1-1815;
3. Lee-Warner, *The Native States of India*, p. 122;
4. Julian Palmer, *op. cit.* p. 14.

States as "quixotic."¹ It has been admitted that "The settlement effected by Lord Hastings forms the basis of modern Indian India: Their (States') constitutional position, as it stands today, developed from his settlement."²

After the stormy career of Hastings there is a lull as it were. The realisation of the fact that Britain was now responsible for the government of all India led men to take a new view of the functions of government."³ Now follows an epoch wherein one notices the alternative principles of non-intervention and annexation vying with each other. The old policy of 'let sleeping dogs lie' was neither possible nor desirable. "If a scrupulous avoidance of interference in the internal affairs of a multitude of isolated principalities was to remain an essential factor in the political system, then annexation was the only corrective; it was the safety valve of the policies of unconcern and isolation."⁴ The successor of Hastings, Lord Amherst, was just keeping things going. During his regime there were neither interventions nor annexations. There was a general drift towards disorder. It was for Lord William Bentinck to reverse the old policy of non-intervention. He took over the administration of Mysore in 1831 in exercise of a right reserved in the treaty of 1799. In doing so he clearly impressed on the "obligation of the protective character which the British Government holds towards the State of Mysore, to interfere for its preservation, and to save the various interests at stake from further ruin."⁵ Not only did he bring home to the Rulers the real responsibilities involved in their acceptance of British protection, he stepped in to set right several social abuses.

An event of outstanding importance during Bentinck's period is his dealing with Coorg. The Company could not directly intervene in its internal affairs, consistently with its isolationist

1. Mehta, *op. cit.* p. 235;
2. Raghbir Singh, *Indian States & the New Regime*, p. 17.
3. Muir, *The Making of British India*: p. 276;
4. Lee-Warner, p. 137.
5. *Mysore Gazetteer*, Vol. i. p. 428.

policy. But misrule had to be terminated. "Therefore on these premises Coorg must cease to be a Native State."¹ As per treaty of 1793, Coorg was taken into "firm and perpetual friendship" and was assured that "no interference was ever intended on the part of the Company in the interior management of the Raja's country."² Distressed by oppression, the subjects of the State applied for British help; a British embassy was despatched to remonstrate. This was of no avail and invoking the principles of international law Bentinck declared war against the Raja,³ who was "unmindful of his duty as a ruler, and regardless of his obligations as a dependent ally of the East India Company," and so, "full of international honours as well as crimes, the Raja surrendered, and was pensioned."⁴ By a proclamation dated the 7th May 1834, Coorg was annexed. The whole procedure bears an international stamp. On the other hand when Bentinck dealt with Mysore, he could act with a free conscience. The treaty of 1799 authorised intervention and even assumption of administration. Coorg furnishes an apposite illustration of a too scrupulous adherence to the policy of non-intervention leading to the most drastic step of annexation. The importance of Bentinck's term of office lies in the fact that new fields were thrown open for British intervention. It was stated that 'principles of natural justice' constitute a source of rights of the Paramount Power.⁵ It was Bentinck who provided with both examples and precepts; the former serving as precedents. He enlarged the bounds of Paramountcy. In reality his tenure of office contributes an important chapter to Indian socio-political history. "He not only abolished *sultee* and other barbarous practices, but he thereby added a new set of political duties, which, derived from the law of nature.....affected British relations with every Native state."⁶

Lord Auckland pursued a weak policy in respect of foreign affairs and in his dealings with Ranjit Singh he did not show any conspicuous ability. Ellenborough effected settlement in Sind by a

1 & 4. Lee-Warner *op. cit* pp. 136-137;

2 & 3. Aitchison, *Treaties* etc., ix, 357-358.

5. Lee-Warner, p. 94;

6. Ch. VIII, *Supra*.

disregard of the treaties with the Amirs on some pretexts. The territories of the Amirs were annexed. The 'reasons' set forth are self-explanatory. As stated by Sir Charles Napier, "there is.....such a growing attachment to the British rule, that.....the question arises whether we should abandon the interests of humanity, and those of the British Government and at once evacuate Sind or.....would it not be better to come to the results at once?"¹ Are 'interests of humanity' and 'interests of the British Government' identical? Again Bentinck's precedent proved helpful. Lord Hardinge (Sir Henry Hardinge) became Governor-General in 1844. It was nearly five years since the death of Ranjit Singh and confusion prevailed in the Sikh Kingdom. Hardinge was not an advocate of the policy of annexation. "He made it a fundamental principle that the Sikh State should be maintained in complete independence if possible; and resolved to abstain from any intervention and from all provocation."² But despite Hardinge's promises to the Sikh Chieftains, their State hardly outlived his Governor-Generalship. Although Hardinge disclaimed intentions of aggression in respect of States which had not accepted British Paramountcy, he showed an attitude of firmness towards the protected ones. There is a passage from a letter addressed to "a chief who shall be nameless" which reads very much like the later sermons of Lord Curzon. He writes: "The British Government never can consent to incur the reproach of becoming indirectly the instrument of the oppression of the people committed to the Prince's charge. If the aversion of a people to a Prince's rule should, by his injustice, become so universal as to cause the people to seek his downfall, the British Government are bound by no obligation to force the people to submit to a ruler who has deprived himself of their allegiance by his own misconduct."³

Lord Dalhousie who came next adopted a vigorous policy of enlarging British dominions and authority. It was within a few

1. Muir, *The Making of Br. Ind.* 328;

2. *ibid.* p. 311.

3. Tupper, *Our Indian Protectorate*, p. 305.

months of his assumption of office that he prosecuted the second Sikh war resulting in the conquest and annexation of the Punjab. On the 29th of March 1849 "the Maharaja Dhulip Singh resigned for himself, his heirs, and successors, all right, title and claim to sovereignty."¹ Dalhousie is remembered mostly for his annexations. They "were either punishments for the States' offences of 'inflicting injuries upon the Company's Government' or for 'violating good faith' towards it; or they were assignments made to the company by Providence itself in its denial of natural heirs to vacant thrones."² He believed that it was the best way of "ensuring to the population of the States a perpetuity of just and mild government."³ Apart from such professed motives, there were military and political considerations also. A legal ground for applying the doctrine of escheat was conveniently found. In a despatch dated 24th January 1849, the Court of Directors stated that they were satisfied "that by general law and custom of India, a dependent principality cannot pass to an adopted heir without the consent of the Paramount Power." In a letter which he wrote to the Court of Directors, Dalhousie said: "In the exercise of a wise and sound policy, the British Government is bound not to put aside or to neglect such rightful opportunities of acquiring territory or revenue.....whether they arise from the lapse of subordinate states, by the failure of all heirs of every description whatsoever or from the failure of heirs natural, where the succession can be sustained only by the sanction of the Government, being given to the ceremony of adoption according to Hindu Law."⁴ Dalhousie is credited or discredited with the invention of the doctrine of lapse. He simply applied a principle which was enunciated by the Court of Directors in their letter. Moreover, as Lee-Warner puts it, "the policy of escheat applied not only to Jhansi and Satara, but to other States, before the rule of Dalhousie, as to Mandvi in

1. Lee-Warner, pp. 103 & 134.

2. Gundappa, *States & their People*, p. 50;

3. *Imp. Gaz.* iv, 82;

4. Arnold, *Dalhousie's Indian Administration*, ii, 119;

1839, to Kolaba and Jaloun in 1840, and to Surat in 1842.....Adoption, and succession to rule, are perfectly distinct.....The son..... adopted will have a right to succeed to any private property.....But before he can succeed to the chiefship, the sanction of the superior sovereignty,.....must be obtained.....It is noticeable that these reasons were not disowned by Lord Canning when.....he regranted Garhwal to its Hindu Raja, and expressly recited that 'Chief having died, leaving no legitimate issue, the above territory has lapsed to the Government.'"¹ In his observations on the Satara case Dalhousie stressed on the adoption requiring "the sanction of the sovereign state, which may be given, or may be withheld."² That Hindu Law recognises a distinction between private estate and a State has to be admitted. A State is not the personal property of a ruler for him or for his widow to bestow upon an adopted child. At the same time the view, 'Policy alone must decide the question'³ whether heirless States should be annexed or not, is indefensible. Dalhousie was not anxious to verify the legality of the policy pursued. The doctrine of escheat came in very handy. He was only carrying out the instructions of the Court of Directors. The old policy of non-intervention had given place to active intrusion. In 1841 the Directors had clearly enjoined their servants in India "to persevere in the one clear and direct course of, abandoning no just and honourable accession of territory or revenue."⁴ He felt that his application of the doctrine of lapse was both just and honourable. His policy provoked great opposition. There were other contributory factors too. The result was the great rebellion of 1857 officially described as the Mutiny.

A new era begins after the Mutiny. The Crown assumes the direct government of India terminating the trusteeship of the Company. In unequivocal terms the British Government repudiates all designs of territorial aggrandizement and professes to act as a

1. Lee-Warner, *op. cit.* pp. 146-147;

2. & 3. Arnold, *Ibid.* pp. 120 & 163.

4. Montmorency, *The Indian States and Indian Federation* p. 27.

with every new encroachment on the rights claimed by the Princes."¹ This is quite true. Lord Canning's declaration of the Crown's Paramountcy and 'the reality in its suzerainty' and his constant emphasis on the Princes' acknowledging loyalty to the Crown are expressive of a new force. The old alliance with the Company, although of a 'subordinate' character, is not the same as the new loyalty to a Suzerain. There is little substance in the following argument of the Princes. "The fact that the Moghal Empire disappeared, or that the Queen assumed the direct governance of India, or later took the style of Empress, did not and could not alter the legal position of the Princes or convert them from allies to feudatories and the Government of India or the Crown from a predominant partner (not equal partner) bound by treaties to a Suzerain whose mandates were law."² On the other hand Paramountcy gained additional strength from political practice which began simultaneously with the Crown's taking over the Government of India. Henceforth treaties play a minor part; political practice supersedes them. "The Crown has been in possession of *full* Paramount Powers latest since 1858. The factors contributing to this were the extinction of the Moghal Emperors and the assumption by the Crown of all government powers formerly exercised by the East India Company as its agent."³ These necessarily brought about a corresponding diminution of the sovereignty of the Indian States.

When Lord Elgin succeeded Lord Canning, he realised how hard it was to continue the policy of non-intervention. The right of intervention is the very stuff of which Paramountcy is made. The Queen's Proclamation did not expressly forbid intervention; neither did it assure non-intervention unconditionally. Yet a strict adherence to treaty terms meant the latter. To step in to correct the Princes when they went wrong involved violation of a solemn pledge. With reference to Canning's policy, he says: "His policy of deference to the authority of Native Chiefs was a means to an end, the end being the

1. Montmorency, *The Indian States*, p. 57;

2. *Brit. Crown and the Ind. Sts.* p. 105.

3. Chalmers and Phillips, *Constitutional Law*, p. 685;

establishment of the British Raj in India; and when the means and the end came into conflict, or seemed likely to do so, the former went to the wall." What a commentary on Canning's good faith! Elgin continues: "In the anomalous position which we occupy in India, it is surely necessary to propound with caution, doctrines which, logically applied, land us in such dilemmas",¹—dilemma resulting from a conflict between a respect for the sovereignty of the Indian Princes and an interest in the extension of Paramountcy.

The first important political case since the Mutiny occurs in the Governor-Generalship of Lord Northbrook. The Gaikwar of Baroda, Mulharrao, was reputed for continued misrule. He was also suspected of an attempt to poison the British Resident. "There was thus added to a charge, of misrule the more serious charge of disloyalty." Between administering the State directly and selecting a successor, the Government of India chose the latter course. This was perhaps on the cautious suggestion of the Holkar that "an attempt to work the State by British officers will be construed into another covering for annexation."² Mulharrao was suspended and a special Commission was appointed to try him. He was acquitted of disloyalty, but deposed on grounds of notorious misconduct, incapacity, and gross misrule.

On this occasion Northbrook wrote to the Gaikwad thus: "My friend, I cannot consent to employ British troops to protect any one in a course of wrong-doing. Misrule on the part of a government which is upheld by the British Power is misrule for which the British Government becomes, in a measure, involved. It becomes, therefore, not only the right, but the positive duty of the British Government to see that the administration of a state in such a condition is reformed and that gross abuses are removed."³ Holkar's suggestion, in the case that he "would rather have a clean removal and a clean succession"⁴ instead of retaining the Gaikwar as a

1. Elgin, *Letters and Journals of James, Eighth Earl of*, pp. 422-423
2. Tupper, *Our Indian Protectorate*, p. 118;
3. & 4. Tupper, *ibid*, pp. 115-117.

figure-head with the administrative charge of the State resting with the Government of India, was approved by the then Secretary of State. In the latter's despatch, as also in Northbrook's letter, one can notice an acceptance by the Government of a fiduciary responsibility. There is further an admission that non-intervention in certain cases would fix a sort of a vicarious liability on the Paramount Power. Salisbury said: "The British Government would not be justified in using its supremacy to compel them (subjects) to submit again to a Ruler whose incurable vices had been established by full experience. You (the Governor-General of India) were accordingly instructed to rest his deposition on the *general ground*. Incurable misrule is of itself a sufficient disqualification for sovereign power. Her Majesty's Government have willingly accepted the opportunity of recognising in a conspicuous case the paramount obligation which lies upon them of protecting the people of India from oppression " ¹

It was in the following year that under the Royal Titles Act the Queen assumed the title "Empress of India". In the course of the subsequent year the Government of India made an important pronouncement: "The paramount supremacy of the British Government is a thing of gradual growth..... Regard must be had to the incidents of this *de facto* supremacy as well as to treaties and charters..... In the life of States as well as of individuals, documentary claims may be set aside by overt acts."² Although there were the usual assurances and re-assurances of respecting treaty rights, two points, namely, 'incidents of *de facto* supremacy' and liability of 'documentary claims' to be 'set aside', are striking in this pronouncement.

The next landmark in the evolution of Paramountcy is the Rendition of Mysore which had been under direct British rule from 1831. Lord Lytton had prepared an elaborate instrument of regrant of the State to its Maharaja. It was during the Governor-Generalship of Lord Ripon that Mysore was restored to the

1. Mem. A. I. S. P. C. p. 25.

2. Butler Committee Report, para 41.

old dynasty. This document, reciting a large number of articles, is not, really speaking, a treaty. It is officially described as an 'Instrument of Transfer'. Elaborate and carefully worded, it contains the most complete statement of the relations subsisting between the Government of *British India* and its feudatories." ¹ Lord Lytton had systematically prepared the way for imposing many onerous conditions on the young Maharaja of Mysore. That he wanted to arrogate more powers for himself as the head of the Government of India than what he could legitimately claim under the treaties and subsisting political practice, is obvious from the following extract from his despatch: "The powers of the British Government to prescribe the forms of administration and to insist that its advice be adopted are the necessary correlatives of the admitted responsibility of the British Government for the internal peace of the whole Empire." ² The importance of the Mysore settlement, although devoid of the element of melodrama characterising the Baroda and the later Manipur episodes, lies in the fact that it became a model for other cases. It has been rightly said that "The first serious attempt to regulate in a definite and permanent shape the relations of the Imperial Government towards the Native States of India was made by Lord Lytton.....The experiment of placing the Maharaja at the head of a constitutional government, makes a new departure in the policy of the Imperial Government." ⁴

Lord Dufferin, the successor of Lord Ripon, assiduously administered advice to the Indian Princes. He is reported to have personally warned a Chief, that the British Government would not tolerate or countenance oppression and misrule. "The Chief of a great Native State, His Lordship said, was not maintained in his position that he might neglect the welfare of his subjects and give himself up to indolence and the gratification of selfish desires."

1. Holderness, *Peoples and Problems of India*, p. 201;
2. P. L. Chudgar, *Indian Princes under British Protection*, p. 111,
3. Strachey, *India* etc. pp. 321-323;
4. Tupper, *Our Indian Protectorate*, p. 305;

The third major event is the Manipur affair. While the Maharaja of Manipur was in exile, his younger brother, the Senapati, had taken charge of the State. Subsequently the Senapati supported the Jubraj to the *gadi*. The Maharaja appealed for help to regain his *gadi* on the ground that he had not abdicated and that under the treaties he was entitled to British protection. The British determined to recognise the Jubraj as the Maharaja on the score that the old Maharaja was incapable and unreliable. There was rebellion in Manipur, and to restore order, an expedition was sent which was resisted by the Senapati and the Jubraj. Ultimately the rebellion was quelled. But the State was not annexed. Some momentous principles were enunciated by the Government. In a notification of August 21, 1891, the Government of India said: "The principles of international law have no bearing on the relations between the Government of India.....and the States under the suzerainty of Her Majesty. The paramount supremacy of the former implies and presupposes the subordination of the latter. In the exercise of their *high prerogative*, the Government of India have the unquestioned right to remove by *administrative order* any person whose presence in the State may seem objectionable."¹ It was in answer to the plea that "Manipur was independent, and that its rulers were not liable to be tried for waging war against the Queen-Empress"² that this Notification was issued. It clarified the position of the States *vis a vis* the Government of India. The Jubraj was tried by a special Commission, convicted, and sentenced to death. A successor was selected by the Governor-General in Council, and a *sanad* was issued on 18-9-1891. The ruler was enjoined to pay tribute and obedience. He was informed that "the permanence of the grant will depend upon the ready fulfilment of all orders given by the British Government."² The following are the outcome of the case: "the repudiation by the Government of India of the application of international law to the protected states; the assertion of the right to settle successions and to intervene in case of rebellion against a chief; the doctrine that resistance to Imperial orders

1. Butler Committee Report, para. 26;

2. *Aitch.* xii. 198.

constitutes rebellion; and the right of the paramount power to inflict capital punishment on those who had put to death its agents." ¹

Curzon's Viceroyalty may be termed the palmy days of Paramountcy. "Intervention reached its zenith", observe the Butler Committee. Curzon's watchwords were efficiency and British prestige. "He thought of Paramountcy as complete sovereignty" and was himself "the embodiment of all that the Political Department stood for." ² He pursued a firm and imperious policy, and the Princes chafed under his stern rule. His stentorian utterances reflect his personality. He made himself felt by the Indian Princes even in their private life. "In the viceroyalty of Lord Curzon the princes were made to feel themselves little more than the agents of the Governor-General." ³ He discouraged their extravagances and excessive foreign tours. He reduced them to a 'ticket-of leave' community. In his Bahawalpur speech he speaks of "the sovereignty of the Crown" being everywhere 'unchallenged'. He adds: It has itself laid down limitations of its prerogative." ⁴ "His idea of the supremacy of the Crown made him send orders to the States, which resented them and for the first time opposition began to grow." ⁵ His frank and forceful admonition to the Princes shows what Paramountcy to him meant. He exhorted them against becoming "spendthrifts, and idlers." He was their veritable mentor. In his Alwar address he said: "The State..... protected and secured, accepts the corresponding obligation to act in all things with loyalty to the Sovereign Power..... These are the reciprocal rights and duties." He advised the Princes to have their administration conducted upon "business principles and with economy." ⁶ Paramountcy had reached a saturation point; it could absorb no more.

1. Lee-Warner, *op. cit.* p. 173.
2. Nicholson *Scraps of Paper*. p. 210;
3. Schuster, *India and Democracy*. p. 127;
4. Bahawalpur Speech;
5. Raghubir Singh, *op. cit.* p. 48;
6. At Jaipur.

Curzon's regime marks the apex of Paramountcy. A decline was the natural consequence. But the Princes did not suddenly recover their losses. They continued in their old position. However, Paramountcy slackened its hold. Yet it found new avenues. If it became less intensive, it grew more extensive. It spread to fresh spheres, economic and commercial. Still it did not ride roughshod as before. A distinct falling action is visible in the years following the exit of Curzon.

A glance at the succession list of Viceroys reveals a remarkable sequence. British policy alternated between the dual principles of order and progress and eventually blended them in Paramountcy. In between two hard task-masters, a timid or soft man is invariably interposed. A fast one is followed by a slow one. This is not accidental. Cornwallis appears between Warren Hastings and Wellesley. Barlow precedes Moira. Amherst and Auckland, Ellenborough and Hardinge, come before Bentinck and Dalhousie respectively. Imperious Curzon is sandwiched between gentle Elgin and meek Minto. Instances can be multiplied; but this is not political history.

CHAPTER XI

Treaties and Sanads.

"A treaty is a contract between States"¹ says Holland. It is a formal agreement; but not all agreements are treaties. In municipal law arrangements between private individuals are known as contracts. "States.....enter into treaties for the purpose of evidencing their commitments in a solemn manner. Treaties do not constitute an agreement, but are only the evidence of agreement.....The rules of interpretation for contracts and for treaties are not identical in every respect."² Treaties may create rights or merely evidence or acknowledge them. In any case they must belong to the sphere either of municipal law or of international law. What are the treaties of the Indian Princes like? At the time when most of the agreements were concluded, as the Princes possessed at least a quasi-international status, they resemble international pacts. But in their later form they are different. Many of them have been supplemented and supplanted by subsequent instruments as there came about a substantial alteration in the relative positions of the parties.

Keith says: "Treaties do not normally apply to parts of the Empire *inter se*."³ If this test is accepted and applied, the Indian Treaties would serve no better purpose than providing a mere record of past events. But they are not just historical sources of Paramountcy. They are legal documents; the British Parliament accepted them as binding. The Crown solemnly promised to respect them. Moreover as the Indian States were not part of British territory and as their subjects were not British subjects, the recognition of the agreements recorded between them and the Company does not militate against Keith's maxim. But he qualifies his view by employing the safe adverb 'normally,' and using the preposition 'of' before the noun,

1. *Int. Law*; p. 170;

2. Stowell, *Int. Law*. p. 132; 3

3. *The Governments of the British Empire*, p. 96.

Empire'. It would have been different if he had used 'in' instead of 'of'. The Indian States were parts *in* and not *of* the Empire. Indian treaties do not fall under any of the following heads: (1) Treaties having the character of conveyances; (2) Law-making treaties; (3) Treaties having the character of contracts; (4) Treaties akin to charters of incorporation; But Elsewhere McNair says: "The word 'treaty' denotes a *genus* which includes the many differently named instruments in which States, or Heads of the States or Governments of States, embody international (including therein inter-Governmental) agreements. There is no canon which determines which name is appropriate in each case."¹ The words in parentheses help us to consider the instruments of agreements between the Indian States and the East India Company as treaties.

The Butler Committee state that "Of the total number of States forty only have treaties.....a large number have some form of engagement or sannad; the remainder have been recognised in different ways."² It should not for a moment be imagined that the non-treaty States are on a lower footing than the treaty States. The various instruments embodying the relations of the States with the Company can, in common, be called treaties. In origin these instruments show essential differences; in form they are dissimilar; but in effect and substance, they are all alike. A treaty is of course a bilateral deed. It can be multilateral also. An engagement is unilateral in form, but bilateral in substance. It means a promise or undertaking. A *sannad* is described as a certificate of grant, or a diploma. "Whatever its correct signification, we realise that in political parlance it is used generally as indicating a grant or recognition from the Crown to the ruler of a state."³ It was a political device employed by Lord Canning to allay the suspicions and fears of the Indian Princes and to court their friendship. They were "To the Princes..... a recognition of a duty; to the British

1. McNair, *British year Book of International Law* 1930.

2. McNair, *The Law of Treaties*; p. 3;

3. Nicholson, *Scraps of Paper*, p. 309 ;

Government an engagement of honour ; and to the expositors of political theory in the new Foreign Department, they became the grant of rights made by the Paramount Power."¹

The treaties belong to different periods and they faithfully mirror the progressive phases of Paramountcy. "The evolution of British power in India is reflected in the long series of treaties concluded between the East India Company and the Indian Princes from the eighteenth century onwards."² The language and tenor of the earlier ones are appreciably different from those of the later ones. Where a single state possesses a number of treaties, it can easily be discerned that they accurately disclose the successive stages through which it was deprived of its powers. A generalisation may be hazarded: while in the eighteenth century the Company negotiated terms on a basis of equality, in the next century it dictated them as a superior power. To cite an instance, it is said that Dalhousie's treaty with Hyderabad "was concluded under pressure administered to a friend and ally..... The treaty was founded on intimidation and compulsion"³ Again, in respect of a treaty with the same premier State, there is an unabashed admission by Colonel Davidson that he witnessed the oburgations and threats then used"⁴ From these facts we may conclude that as the treaties belong to a long period of over a hundred and fifty years, at first they served as sources of Paramountcy and later on, they themselves proved to be the outcome of it. In the following paragraphs, treaty relations between the Company and some major States are chronologically sketched ; some illustrative treaties are analysed and their implications pointed out, but no exhaustive analysis is attempted.

Treaty relations between the Company and Hyderabad commenced in the middle of the eighteenth century. A treaty of mutual neutrality was concluded on the 14th May 1759. A slight change of relationship is visible in the next important treaty

1. Nicholson, *Scraps of Paper*, p. 330 ;

2. Barton, *The Princes of India*, p. 249.

3 & 4. Sastry, *Indian States*, pp. 167 and 139.

revived. "No material change in the system of administration shall be made without the consent of the Governor-General in Council," says article 22. The next article goes further: "In the event of the breach or non-observance by the Maharaja of Mysore of any of the foregoing conditions, the Governor-General in Council may resume possession of the said territories and assume the direct administration thereof." This conclusively proves the establishment of a general right of intervention. In the treaty of 1913 there is a reiteration of "the power of exercising intervention by virtue of the *general supremacy* and paramount authority, and also the power of taking precautionary or remedial action."

In 1846, Kashmir, which was part of the defeated Lahore Kingdom, was granted in subordinate sovereignty to Gulab Singh, the Raja of Jammu. By the Treaty of Amritsar he was assured of "independent possession" of the State. Within two years he was made to feel what his position was like. On the pretext of misrule, direct interference was threatened. The occasion of succession was availed of for appointing a British Resident in 1885. The Ruler protested, but Lord Dufferin replied that "The appointment was not meant to be derogatory to the position of the State."¹ Whatever the motive, the effect was clear. Intervention became frequent. The renunciation of authority by Pratap Singh in 1889 was taken advantage of and the administration was handed over to a Council consisting of selected officials of the British Service."² Gradually the Maharaja's suzerainty over vassals like the Chiefs of Poonch, Hunza, and Chitral, was terminated by the assumption of all powers over them by the Resident himself.

Indore came into treaty relations at a fairly late period. General Lake actually dictated a treaty of 'Peace and amity' on the 24th December 1805. Onerous terms were imposed on the Holkar Maharaja. The next important one, the treaty of Mandsor, 6-1-1818, is an amending treaty. Malharrao Holkar had

1. Nicholson *Scraps of Paper*: p. 107;

2. Lee-Warner, *op. cit.* p. 278.

to cede part of his territories acquired by conquest, and "the British Government undertook to support a field force to maintain the internal tranquility of the territories and to defend them from foreign enemies." ¹ The Maharaja was obliged to accept the position of subordinate alliance. He was denied the right of foreign alliance and even correspondence. His "entire acquiescence in the event of differences,.....agreement not to send or receive *vakils* from any other State, or to have communication with any States except with the knowledge and consent of the British Resident," were insisted upon. When Harihar Holkar died issueless in October 1843, his mother was allowed to choose a successor. The Governor-General took occasion to say that by the death of the late Ruler without "leaving an adopted son, or any one entitled to succeed, 'the *guddes* of the Holkar State became vacant.' Thereon it became 'necessary for the Governor-General to make an arrangement for the administration,'.....The Government determined.....to make such an arrangement as would.....be agreeable." Lee-Warner says that the arrangement contemplated "upon.....the foundation of motive and prerogative,.....exonerates Lord Dalhousie from the charge, so often brought against him, of discovering a new doctrine of lapse."² The Indore case served as a precedent for the exercise of the prerogative of confirming all successions in the Indian States.

Udaipur entered the treaty scheme late. In obedience to an Act of Parliament,³ which condemned a policy of 'conquest and extension of dominion', and to the Charter Act of 1793⁴ which repeated the old restriction, and in pursuance of a policy of unconcern, the Company had left Udaipur to itself. Udaipur and other Rajput States were within the Mahratta spheres of influence. By a treaty of 22-11-1805 with Gwalior, the Company had bound themselves not to enter into treaties with Udaipur. These restrictions were removed by another treaty in 1817. On the 13th January of 1819, a treaty

1. Lee-Warner, *op cit.* p.212.

2. *ibid*, p. 314.

3. *Imperial Gazetteer*, ii, p. 418;

4. 23 Geo. iii, c. 52, sec. 42;

was concluded between the Company and the Maharana. This is said to be typical of Lord Hastings' treaties. After the usual prefatory phrases, it proceeds: "the British Government engages to protect the principality and territory of Odeypore..... The Maharana shall always act in subordinate co-operation.....and will have no connection with any other Chiefs or States he shall submit to arbitration." Certain military obligations were imposed. He was bound to 'furnish troops at the request' (not the behest) of the British Government. He was allowed to remain 'an absolute ruler,' and an assurance was given to him that "there would be no introduction of British jurisdiction into that principality." He was permitted only 'amicable correspondence' but not negotiation with other states. Despite the recognition of the Maharana's absolute sovereignty in internal matters, intervention was resorted to in 1854 in the name of 'humanity' and the principles of 'Western civilisation'.

It has been argued by the official or professional champions of the Princes that a *sanad* "must necessarily be interpreted as a mere admission or acknowledgment on the part of the Crown where it purports to grant sovereign authority and powers which are already vested in and exercised by the grantee."¹ Or again, "The grant of a *sanad*.....confirming to a State a right which inherently belonged to it, does not entitle the Paramount Power to claim that it has created the right in the exercise of its Paramountcy."² This argument is based on two hypotheses; first, that the *sanad* in question is one which confirms a right; secondly, that the right was inherent in the State. But what about *sanaads* extinctive of rights and States which had no 'inherent rights?' Whether a *sanad* is a grant or not depends more on the substance of the instrument than on its form. If, as Sen holds, distinctions between 'Sanad States and Treaty States cannot reasonably be maintained'³, a similar opinion may be expressed about his own attempt at classifying treaties. The Princes complained that the term *sanad* was always treated as a grant.

1. & 3. Sen, *op. cit.* p. 3;

"2. Panikkar, *Indian Princes in Council*, 29;

whereas it was not and could not be so. "A *Sanad* by way of a grant can have no operative effect, as a grant, if the grantee already has the powers which the *sanad* purports to grant. It could only have that effect, if the grantee State had, at some previous date in its history, ceded to the Crown those very powers which.....the *sanad* purports to grant; or if it were a case of a re-creation out of British India of a lapsed state, or a cession to an existing ruler, of territory which at the date of the *sanad* was a part of British India." ¹ These are arguments *ex hypothesi*. The Counsel maintained that the "machinery of a *sanad* cannot be used so as to curtail the powers of a ruler." But a *sanad*, being a grant, may set forth such conditions as would result in taking away powers by means of 'granting' some special favour or privilege. It need not always be an unconditional grant or gift. To say that the Crown cannot 'take away' any rights by means of *sanad*, is to question the Crown's Paramountcy itself. The Counsel for the Princes try to mathematically demonstrate their theses; but all their arguments are based on certain *a priori* assumptions. The "total of complete sovereignty" as the Counsel put it, "*minus* such rights given up which constitute Paramountcy, and all other cessions", leave certain powers. They presume that "the state still possesses 'x' rights," and hold that "if the *sanad* defines the State rights in terms of 'x' or 'x' *plus* something, it is operative; while if it does the other way, say by narrowing the rights to 'x' *minus* something, then the *sanad* will be inoperative." With due respects to the learned Counsel, we may venture to remark that in trying to explain the operative aspects of a *sanad* in terms of an algebraic equation, they indulge in mere equivocation. The point is a *sanad* is to be regarded merely as a document recording a transaction which may be either a grant or a deprivation of powers. The Patiala *sanad* insists on the Ruler 'promoting the welfare of the people,..... preventing female infanticide, *sati*, slavery, and..... enjoins obedience and loyalty to the powerful Government who will likewise continue to uphold his honour, respect, rank and dignity." Does it mean

1. Opinion of Scott and others, para 5 (c).

that except the last clause (ten in the *sanad*), the rest are inoperative? Is a *sanad* to be read in parts and accepted similarly?

To understand the full import of the treaties, they should be read in the light of history. The general trend is that the later treaties either confirm or supersede the earlier. Language originally courteous and even courtly, becomes curt and the change has been unfavourable to the Princes in most of the cases. "The treaties,.....of the Indian Chiefs must be studied together as a whole,.....It is equally important to study them in connexion with the general framework of history."¹ Lee-Warner advocates the principle of 'extensive application'² in the construction of treaties. What was an obligation confined to a particular State may be regarded as applicable to other States also, the basis for this being, "language of the treaties, ordinary conditions attached to protection, and analogy of other states." He gives an illustration of how the rule of unlimited liability of the States in time of war, became, by the "principle of 'extensive interpretation', an ordinary condition of protection."³

The treaties reveal the drifting of the relationship between the Indian States and the East India Company from an international to an imperial basis. At first the Company dealt with the States as independent powers; but no full international status was accorded to them. Rules of international law can hardly apply to these treaties which could have merited their application had the States been independent political communities at the time when they were executed or negotiated, as well as at subsequent times when they were in issue. According to Holdsworth, "All the Indian States were originally independent. They retain all their rights as independent States except so far as they have ceded their rights to the Crown by agreement express or implied."⁴ The first proposition is historically not true and the second is legally not tenable. What is that 'independence' whose very existence depended on protection? The loss of powers by the Indian States-

1, 2 & 3. *Protected Princes*, pp 40, 197, 225.

4. Holdsworth, *Law Quarterly Review*, 46, 1930, p. 410.

is not a result of 'cessions', or 'agreements'. in either case, a consensual element being implied. The Princes contended that the treaties were pacts of friendship, as between equal States. They invariably regarded them "as freely negotiated bilateral agreements; almost indeed in some cases — though this interpretation has been repudiated by the British Government — as instruments of alliance rather than of subordination."¹ The States were denied international rights by these very treaties, rather than by the subsequent declarations of the Government of India as in 1891. Those concluded during the regime of the Marquis of Hastings unmistakably deprived the Princes of all international and even interstatal rights. At best they "are no more than provisional memoranda of the conditions with which the parties started.....their relations with each other, on the tacit understanding that further developments were to be left to the exigencies of time and circumstance."²

If, in the interpretation of these treaties, rules of international law could not be applied, could the principles of municipal law be invoked? Clearly not. Just because one law does not hold good, it does not follow that the other would apply. In the *Tanjore* case it was laid down that the transactions between the Indian States and the Paramount Power "are governed by other laws than those which municipal courts administer."³ Similarly in another case it was held that "Municipal courts have neither the means of decreeing what is right, nor the power of enforcing any decision which they may make."⁴ This is particularly so as the treaties are "political (not legal), made between a foreign power and subjects of the Crown acting as an independent State under the Charters."⁵ The "treaties are more guides of political conduct rather than sources of legal

1. Coupland, *The Future of India*, p. 145;
2. Gundappa, *The States and their People*, p. 60 ;
3. *Secretary of State Vs. Kamakshibai*, 13, M. I. A., 476 ;
4. *Madhav Sing Vs. Secretary of State*, 31, I. A., 239;
5. *Nabob of Carnatic Vs. East India Company*, 2 Ves. 56;

rights.”¹ Sen tries to make out a case for the application of the usual rules of interpretation. He says : “ The first and foremost rule of construction is that the treaties should be interpreted in the spirit of *uberrima fides*.....Treaties.....should be interpreted according to the natural, fair, and received acceptation of the terms in which they are expressed.” These are legal platitudes. They are based on a presumption that the treaties are international compacts, and so have no bearing on the treaties in question.

It was urged on behalf of the Princes that their treaty relations were with the Crown. In no treaty is the Crown mentioned. The treaties usually run either in the name of the Government of India, or, before 1858, in the name of the East India Company. The officer subscribing them does so, not on behalf of His Majesty, but on behalf of the Governor-General in Council. This is a material particular. There is nothing to warrant the Princes' assertion that the treaty relations were 'personal'." It may be permissible to doubt, whether as a historic (must be 'historical') fact, there was any personal element in the treaties entered into between the Indian States and the East India Company.....The proposition that treaties or engagements of defence and security between States are personal and not national is one that has been negatived by law officers of the Crown as early as 1764.”² In the words of Ludlow, “the distinction made by writers on international law, between real and personal treaties, is one which has been as glibly used for the extinction of the native States, as it has been little considered. If a contract is made with a King it is not therefore presently to be reputed personal.....if it be added to the treaty that it shall stand forever, or that it is made for the good of the Kingdom or with him and his successors..... it will from hence fully appear that the treaty is real.” Adverting to Sen's criticism of Sir Sivaswami Aiyer's opinion that the treaties are like praedial servitudes or

1. Varadachariar, *op. cit.*, P. 20

2. M. K. Nambyar, The States' Declaration of Independence,
• *Federal Law Journal*, 1947.

covenants running with the land",¹ Sastry remarks: "If these treaties are taken to be personal in character, it unhappily cuts at the root of title of the present rulers, the enhancement of whose status is so dear to an eminent writer like Sirdar D. K. Sen".²

There is no uniformity in method or consistency in language employed in the different treaties of the same period or treaties with any particular State concluded on different dates. Westlake suggests that not only should the treaties be "read as a whole" but that "the position of all the native princes is to be ascertained from the principles latest adopted in dealing with any of them, as the position of all vendors and purchasers of property, or of all drawers and endorsers of bills of exchange is to be ascertained from the latest decisions with regard to any of them."³ But the Indian States Committee recognised the claims of the Princes that "each State must be considered separately, and said: "The treaties were made with individual States, and although in certain matters of imperial concern some sort of uniform procedure is necessary, cases affecting individual States should be considered with reference to those States individually."⁴ Treaties vary in their contents and incidents immensely. Some are creative of rights in favour of States whereas a few are extinctive of the same. Many are evidentiary of previous rights. If the instruments are read as a whole, or collectively, individual States may suffer from the applications of rules *en masse*.

The suggestion that the treaties should be read in the light of history brings us to an important doctrine, *conventio omnis intelligitur rebus sic stantibus*. Every treaty is understood to apply only so long as the circumstances contemplated by it continue to exist. "The treaties and engagements of the native States cannot be fully understood either without reference to the relations at the time of

1. P. S. S. Aiyer, *op. cit.*, p. 213;

2. Sastry, *Indian States*, p. 188.

3. Westlake, *Col. Papers*, p. 214;

4. Butler Committee Rpt. 38;

their conclusion, or without reference to the relations since established between them."¹ "The moment these relations cease to exist by means of a change in the social organisation of one of the contracting parties, the treaty ceases to be obligatory upon him."² As Westlake would have it, "The very conclusion of a treaty has been considered to be subject to the tacit reservation *rebus sic stantibus*."³ As illustrations of the changed circumstances justifying the application of the doctrine, Lee-Warner cites the resignation of sovereignty by the Peishwa, the trial of the Emperor, and the transfer of the Company's rule to the Crown. It is also recommended that "the actual relations (between the Indian Princes and the Paramount Power) have to be estimated in the light of conditions prevailing at the time of the interpretation of the treaties and not at the time when they were made."⁴ The application of the *rebus stantibus* doctrine will be again discussed with reference to political practice and usage.

The Indian treaties have unfortunately passed through the process of interpretation which has been neither judicial nor judicious. The task of interpreting treaties was done by the officers of the Political Department, who belonged either to the Army or to the Civil Service. Their system of dealing with the States was characterised by "secrecy, secret despatches, mysterious communications, orders and regulations; which nobody can understand, which vary from State to State, or from moment to moment, in each State."⁵ One can very well imagine the fate of treaties of which they were the interpreters. Rushbrooke Williams complains that "with the help of the misinterpretation of a phrase 'subordinate co-operation' the political agent has become the repository of almost unique powers."⁶ As pointed out by another stalwart champion of Indian Princedom, "The Ruler and his administration are regarded as under the orders

1. Lee-Warner, 40;

2. Wheaton, *International Law*, Sn, 29;

3. Westlake, *ibid*, 234;

4. Mehta, *Hastings and Indian States*, p. 240.

5. Chudgar, *Indian Princes under British Protection*, P. 122;

6. *The British Crown and the Indian States*, P. 111;

of the Political Officer."¹ In the hands of the Political Officers the Indian Treaties have suffered more than a 'sea change,' as they have been interpreted progressively. If "a treaty of perpetual obligation is unknown to law",² the same can be said with greater emphasis about treaties which were subject to Paramountcy. Political practice always attempted to read them realistically. If under the colour of interpretation, essential terms have been misread, it can only be attributed to the change in the relationship between the parties, wrought by lapse of time. There is no point in trying to interpret them in a spirit of pure legalism. After all "There is nothing sacrosanct about the entirely human documents called treaties".³

If the treaties have been superseded by political practice and usage, so much the worse for the treaties themselves. They contain several vulnerable features which exposed them to being overridden without overt and timely denunciation. Political practice is unilateral; denunciation implies providing an opportunity to the other party before altering or repudiating its treaty rights. The rules concerning rescission of contracts are quite inapplicable. First, the treaties are not perfect international pacts. Secondly, in a large number of cases, they have suffered alteration on account of some non-feasance or misfeasance on the part of the Princes themselves. Lord Chelmsford however admitted that treaty rights of Princes had been disregarded: "We cannot deny however that the treaty position has been affected and that a body of usages, in some cases arbitrary, but always benevolent (?) has come into being."⁴ And in the opinion of Westlake, the British Government did not really consider that they had violated any rights of the Indian Princes. "They construed a treaty not by its bare words, but as necessarily reserving the right of the Paramount Power to follow its known principles of action."⁵ But 'known' to whom? Granting

1. Panikkar, *The Indian Princes in Council*, p. 151

2. Varadachari, *The Indian States in the Federation*, p. 59;

3. Gundappa, *All-Indian Federal Union*, 34 ;

4. Lord Chelmsford's Speeches vol. ii, p. 278.

5. Westlake, *Collected Papers*, p. 235;

that the Princes had knowledge of the 'principles of action,' it does not follow that they approved of them. When some unknown principles of action are applied, much less does the theory of consent hold good.

If one of the parties to a treaty desires to get its conditions modified or abrogated, it is necessary that he should give due notice to the other party. Normally no treaty can be avoided without express denunciation. But where the other party has placed himself in a position wherein his consent is inoperative, there is no point in claiming that the formality of a prior express denunciation must be observed. In private contracts as well as in international covenants, notice of termination of agreement is specifically given. That occasions should have arisen for the violation of treaties, reflects on the merits of the treaties as well as on the conduct of both the parties. Denunciation may be verbal, or it may be in conduct. The latter assumes the form of actual repudiation. This can be done "When that State of things which was essential to, and the common cause of, the promise or engagement has undergone a material change, or has ceased."¹ Who is to judge the change or cessation of the original state of things? It has always been taken that the treaties are interpreted by time. The Indian Political Department has built a tradition of reading the treaties, neither in their original letter nor in their spirit, but as conditioned by the changing policies of the periods. As observed in the Montague-Chelmsford Report, "The position hitherto taken up by the Government has been that.....the treaties must be read as a whole, and.....interpreted in the light of the relations established between the parties not only at the time when a particular treaty was made, but subsequently." This shows how no occasion arose for any 'denunciation' of a treaty.

1. Phillimore, *Three Centuries of Treaties of Peace*, p. 136.

CHAPTER XII

Political Practice and Usage.

Political Practice is not only one of the acknowledged sources of Paramountcy; it is its most fertile source. It cannot be defined with any precision. In the opinion of the Butler Committee, "Modern Political Practice began with the acceptance of the necessity of intervention" as "The administration of many States broke down temporarily under the strain of the great famine of 1899, and drastic intervention became necessary."¹ But intervention had begun much before. The Committee say: "The Paramount Power has had of necessity to make decisions and exercise the functions of paramountcy beyond the terms of the treaties." They add, "The process commenced almost as soon as the treaties were made". What an admission! The making and breaking of treaties must have gone on *pari passu*. Political practice, through prevalent prior to 1858, got systematised after the creation of a new department to deal with the States exclusively.

Political practice is not just an application of the principles of Paramountcy in any given case. An independent source of rights, it is complementary to theory. In theory Paramountcy means the sum total of specific rights derived from treaties and usage. By virtue of its Paramountcy the Crown could not claim unlimited rights over the States. "It (Paramountcy) is not a theory to cover vague and undefined claims and it cannot be a source of further authority."² This contention is theoretically correct. But the recognition of political practice as one of the sources of Paramountcy inevitably puts a high premium on the application and not on the theoretical bases of the institution. "Though primarily the jurisdiction of the Crown over the feudatory native States depends upon treaties or agreements, in practice the Crown claims and exercises a much larger measure of control where the interests of the Empire or of the subjects of the

1. Panikkar, *Interstate Law*, p. 13;

native princes are concerned."¹ It has time and again circumscribed the sovereignty of the Princes. Under such circumstances, to regard Paramountcy as being in essence just "an exceptional use of political authority in the interests of a State or pursuant to the obligations which the British Government has undertaken by virtue of treaties"² is merely to under- reckon its implications.

The relationship between the Indian States and the Government of India since 1858 must be explained more in terms of 'political practice' than in terms of 'treaty rights'. The treaties had been concluded under different conditions. They had begun to run into desuetude. They had been worn out more by disuse, than by abuse, as the officers of the Political Department refused to be fettered by the inconvenient terms contained in them. Instead, of bothering themselves with interpreting or applying them, they summarily ignored them. Here is a suggestive observation of one of that 'bureaucracy'. "The process of attrition has been aided by the methods and practice of a powerful bureaucracy of diplomats now known as the Political Department, instituted after the Mutiny to take charge of the relations between the States and the Government of India."³

There are few treaties of any importance since 1858. The Political Department carried on its 'practice' with the result that the treaties were fast becoming 'scraps of paper', as Nicholson prefers to call them. To justify their violation of treaties, the Political Department began to evolve a novel theory. They tried to prove that the Indian Princes were no better than feudal Chiefs. "The Political Department seems to have long acted on the assumption that treaties with the States have not the sanctity of treaties made with other powers. It was not long before Political Secretaries felt the need of a philosophy to justify their irregular procedure. A work,

1. Ridges, *Constitutional Law of England*, p. 531;

2. Panikkar, *Indian States and the Government of India*, p. 43.

3. Barton, *The Princes of India*, ch. xiii,

the sacred mystery of political practice, was compiled by Sir Charles Lewis Tupper, the first high priest of the Department's policy."¹ Tupper not only propounded the feudal theory; "He developed it almost to the point of demonstrating that the Chiefs were great hereditary officers responsible to the Government of India.....There was nothing left of the treaties."² To quote Tupper himself, "the native rulers may be regarded as the agents.....of the British Empire at large, for the administration of part of its varied possessions."

Political practice was the outcome of stray decisions of the Government of India which were applied in analogous cases. Precedents are established in that manner. But precedents themselves must be founded on something. There must be a *ratio decidendi*. It is difficult to discover the principles on which the treaties were ignored and a political practice, often running counter to them, was instituted. There were Royal proclamations acknowledging the sanctity and inviolability of treaties. How could they be explained away? To justify deviations from the professed respect for the treaties, the spokesmen of the Political Department propounded a theory that "the transfer of the Government to the Crown implied a new subordination of the States." Another was that the "Departmental interpretation of treaty engagements had the effect of law and constituted 'Indian Political Law', a phrase which was minted."³ Treaties were no longer the sources of Paramountcy; they were replaced by political practice. The former had become stagnant pools and the latter was a perennial stream supplying vital force to Paramountcy. The three leading cases of Baroda, Mysore and Manipur, have been alluded to. These are the supreme instances of Political Practice and Tupper's 'three cardinal principles' of the Indian Political system can be said to have been most effectively applied in them. They are: "(1) The maintenance of the supremacy of the Paramount Power..... (2) The preservation of autonomy of the feudatory states (3) The denial of any

1. Nicholson, *Scraps of Paper (India's Broken Treaties)* p. 57;
2. Barton, *The Princes of India*, p. 276;
3. Nicholson, *op. cit.* P. 57;

right divine to govern wrong." ¹ Tupper attributes the first principle to the policy of Lord Wellesley and Lord Hastings and the second emanates from Lord Canning's time when the policy of annexation was abjured. When once the principal was enunciated that "the political system of India does not always rest upon a treaty", ² elbow-room was created for the expansion of political practice. The complaint of the Indian Princes that their jurisdiction was being virtually ousted does not look unfair.

□

The next important figure who contributed largely to the growth of political practice is Sir William Lee-Warner. He was commissioned to restate the position of the Indian States. Nicholson regards him as the second high priest of the Political Department and mentions the name of Sir Harcourt Butler as the third and last in the series. Lee-Warner does not accept some of the views of Tupper. He speaks of the latter's book "as suggestive and interesting" ³ but not as authoritative or even convincing. He rejects his predecessor's theory of feudal relationship. He characterises his arguments as "elaborate and clever" ⁴ He shows the essential distinctions between the Indian States and European feudalism and draws attention to Tupper's own admission that in India there was "no general system which can properly be termed feudal in the European sense of the word." ⁵

Lee-Warner did good service to Indian Princes by raising them from a feudal to a sovereign status. But what he gave them was less than what he deprived them of. He enunciated the twin canons of reading the treaties as a whole and regarding them as interpreted by history. In his own words, "Treaties are subject to the fretting action of consuetudinary law, and the judgments of the British Government upon issues raised by its dealings with the Native states test the treaties by the touchstone of practical application." ⁶ He

1. Tupper, *op. cit.* p. 25;

2. Curzon's *Bahawalpur speech*

3 & 4. Lee-Warner, *op. cit.* p. v. & p. 374

5. Tupper, *Our Indian Protectorate*. p. 246;

6. Lee-Warner, *ibid.* p. 29.

pleads for a 'most generous construction' of the treaties. 'Judgments of the British Government' and 'touchstone of practical application'—these phrases reduce the treaties to pulp, to worse than scraps of paper. Lee-Warner's principle of generous construction means taking the treaties of all the States together and interpreting them 'extensively' that is, not according to their contents, but as required by surrounding circumstances, precedents, and political considerations. Whether such a course leads to results which are in conformity with the conditions and stipulations actually agreed upon, is immaterial. This 'extensive application' theory was the necessary corollary of the Crown assuming responsibility for the whole of India. There had arisen problems of an all-India nature, such as railways, posts, and cognate services. "The need for the exercise of general control in the interests of the States, India as a whole, and the British Empire led to usage and practice of the Political Department. The Crown intervened in cases of disputed succession, minority, or gross incompetence, even when there was no treaty to that effect. In course of time the stage is reached when treaties, engagements and sannads must be construed as subject to the Crown's Paramountcy."¹ To bring about this Lee-Warner's contributions are not negligible. What he says of Tupper in regard to the latter's preference for calling the Indian States 'feudatories', as 'a clever, but imperfect' justification, might as well be applied to his own theory of the Indian States' sovereignty and the principle of 'extensive interpretation' postulated by him.

It was again Lee-Warner who legalised political practice by exalting the orders of the Department to the rank of 'judgments' serving as sources for the future. His description of such decisions as judgments.....upon issues raised," is not legally correct. Executive or administrative decisions are not 'judgments'. In the Manipur case, by a Resolution, the Government of India ordered the military occupation of the State and instructed the Officer-Commanding to place upon trial all persons suspected of murder etc. In a proclamation it was stated that "Her Majesty the Queen-Empress of India has been pleased to forego Her right to annex

1. Wade and Phillips, *Constitutional Law*, p. 687 ;

to her Indian dominions the territories of the Manipur State.”¹ Is this Proclamation a ‘judgment’ or can the earlier Resolutions passed without any previous conference or discussion with the affected persons, be called judgments? It is true, the word judgment need not always stand for the sentence of a court of justice. At the same time the term is associated with any proceeding which has some judicial character. At least in law it is so.

It is not possible to precisely define the duties and powers of the various members of the Political Department. “The duties and powers of these officials are very wide and vary greatly: They are not defined; there is no settled procedure regulating them..... Their powers must vary with the everchanging policy of the Imperial Government and the Government of India.”² The policy was shaped mostly by the desire and anxiety for stabilising the imperial system. The officers of the Department strenuously exerted themselves to extend the ambit of their own authority. This motive, time and again, prompted them to encroach upon the treaty rights of the Indian Princes. Here is a telling confession of Lord Hastings. “In our treaties with them (the Indian Princes) we recognise them as independent sovereigns. Then we send a Resident to their courts. Instead of acting in the character of ambassador, he assumes the functions of a dictator, interferes in all their private concerns, countenances refractory subjects against them and makes the most ostentatious exhibition of his exercise of authority.”³ Practice has thus modified and even abrogated theory. But for this Paramountcy would not at all have flourished.

The Political Department was from the very beginning run by “an imperious bureaucracy who have withheld agreements, made their own laws, over-ridden treaties etc.”⁴ The officers of the Department, from the Governor-General to the Political Agent or Secretary to him, wielded wide powers. “The position of the Political Agent varies, however, enormously in different native

1. Mukherji, *Indian Constitutional Documents*, vol. i, 589.

2. Chudgar, *Indian Princes under British Protection*, p. 120

3. *Private Journal of the Marquis of Hastings*, pp. 26-27

4. Nicholson, *op. cit.*, p. 53.

States. In some he is merely a friendly and no too intrusive adviser to the native Prince; in others, he is in all, but in name, the ruler of the State."¹ Although an Officer of the Political Department was all along a member of one of the departments of the Government of India, his responsibilities were more to the 'Viceroy' than to the Governor-General in Council. It was a convention that the Governor-General should have the States in his portfolio. After assuming the administration of India "the next development of British policy was to capture the machinery of the States by the penetration of British agents and advisers."² They seem to have been imbued with a sense of the omnipotence of their Department. Sir Roger Chailley describes them: "Political Officers who reside at the courts of the Indian Rulers are in truth their masters The attitude is the attitude of a servant who directs his master, polite, impertinent and ironical"³ The following extract from a letter by the Prince of Wales, (later on Edward vii) to his mother, speaks for itself. "What struck me most forcibly was the rude and rough manner with which the English Political Officers (as they are called, who are in attendance on the Native Chiefs) treat them. It is indeed much to be deplored, and the system is, I am sure, quite wrong."⁴ The words 'who are in attendance on the Native Chiefs', appearing in parentheses, are worth noticing. They indicate what the position of a Resident was expected to be. Ruthnaswamy observes: "Although some of his duties and functions were those of an ambassador..... he was more and less than an ambassador He had powers of intervention.....that transcended merely ambassadorial duties.....He was less than an ambassador as he had no plenipotentiary powers in any circumstance or contingency."⁵ Nor could he be one as his position was not one which international law could recognise.

1. Marriott, *English Political Institutions*, p. 325.
2. Fenner Brockway, *The Indian Crisis*, p. 68.
3. Chailley, *Problems of British India*, p. 259.
4. Sydnee Lee, *King Edward vii*, vol. 365.
5. *British Administrative System in India*, p. 495;

Political practice was not always an active affair; it was of passive conduct also. If Residents earned a reputation for excessive meddling, they have also an equal claim for having pursued Walpole's policy. There were not a few who preferred to treat their office as a sinecure. "The Political Residents have generally appreciated the old saying that their principal duty was to reside."¹ But their duties were manifold. They involved a close scrutiny of the Prince's administration. This meant interposition on occasions. "The interference of Residents and other political officers in the affairs was a necessary consequence of the subsidiary system."² In the exercise of their supervisory powers they often entered into the personal affairs of the Princes. Occasionally they were obliged to do so. In the name of tendering advice the Residents issued mandates. As aptly observed by Ambedkar, "It is well-known that what is called advice is a diplomatic term of dictation."³

If political practice was just the other side of political theory based on treaties and engagements, there would have been no necessity for Tupper's secret manual and other similar papers. The Princes were never appraised of what political practice really meant. The Butler Committee claimed: "a great principle has been established. The States have been taken into open conference. The policy of secrecy has been abandoned. For the old process of decision without discussion has been substituted the new process of decision after open conference and consultation." But this during the decadence of Paramountcy. The Department was able to achieve its object of self-aggrandizement by virtue of its policy of secrecy. That the office of a Resident or Political Agent had the traditions of secrecy is evident from its ancestry as well as from the full title of the Department to which it belonged. "The Political and Secret Department of the India Office (in the United Kingdom) has inherited the functions of the old Secret Committee of the India House",⁴ observes Malcolm Seton.

1. Garratt, *An Indian Commentary*, p. 189.

2. Ruthnaswamy. *Ibid.*, p. 4955;

3. Ambedkar, *Federation Vs. Freedom*, p. 99

4. ° Seton, *India office*, 164

Usage was an ever active source of Paramountcy. Its work is vividly summarised by Lee-Warner: "It amends and adapts to circumstances duties that are embodied in treaties of ancient date, and it supplies numerous omissions from the category of duties so recorded."¹ Its meaning in relation to Paramountcy is not in all fours with what it is in municipal or international law. That the common acceptation of the term has no place in its special context is evident from the following definition. Usage is "a general body of rules and principles expressing the paramount authority of the Crown, while at the same time limiting the sovereignty of every ruling Chief,—the final interpretation of these rules and principles resting with the British Government."² This is a definition of this singular 'usage' wherein the element of consent is not at all mentioned. In general legal parlance usage is said to be 'practice long continued'.³ It is "a habitual course of action"⁴ or a habit of acting in a certain way. It receives judicial recognition under certain circumstances. It is "a reasonable and lawful public custom which is either known to the parties or so well established, general and uniform that they must be presumed to have acted with reference there to."⁵

Usage is closely related to political practice. But whereas the latter is an active exercise of discretionary authority, the former is more or less the product of a time factor. If the one was manifested in occasional or periodical interventions, the other implies some continuity and consistency of conduct. Political practice has no claims to be considered as a legal source except in connection with Paramountcy, while usage has all along been recognised as a source of law and therefore possesses superior value. Political practice is not a 'public' matter; it is not 'known to the parties'; nor is it 'well established, general and uniform.'

1. Lee-Warner, *The Native States of India*, P. 204.
2. Manfred Nathan, *Empire Government*, p. 107;
3. Wharton, *Law Lexicon*;
4. Holland, *Jurisprudence*, p. 57;
5. Black's *Law Dictionary*.

It is more or less affected by personal factors, as it is based on discretion. Usage may not always be reasonable; but it cannot be whimsical, capricious, or spasmodic. It is more objective than political practice. Custom or usage (at present considered as synonymous), is the actual course of things "constantly adapting itself to the growing needs of society." It is not the result of some imposition which political practice is. But both are mutually complementary. By sheer continuity of operation political practice acquires a prescriptive title to become usage. Practice is the product of a series of isolated acts taken in a sequence. Usage is thus established by practice. Such usage in turn becomes the source of further practice. The two move in a vicious circle. Political practice as a source of Paramountcy is at one and the same time the source of usage also; and the latter, an unwritten source, unlike political practice which depends on case-law to a large extent, "is the most considerable of the five affluents to the volume of rights and duties."¹

In municipal law usage implies an element of consent for its validity. Salmond regards usage as 'conventional custom'.² The authority of any usage is conditional on its acceptance and incorporation in agreements between the parties bound by it. Before the validity of any alleged usage is established it must have satisfied the following requirements. The existence of the usage must have been proved; such *de facto* existence must have been embodied in some statute, treaty, or rule of law which the court could take cognisance of. These tests cannot be applied to usage when it appears as one of the sources of Paramountcy. Usage as a concept of international law also rests on consent. In fact it is entirely based on it. International law having a consensual element as its only foundation, usage under it must necessarily involve consent. As the Indian States have no place either in civil law proper or in international law, usage in relation to the Crown's intercourse with them must be interpreted with reference to neither. Analogies from mercantile or any other law are of little value.

1. Lee-Warner, *The Native States of India*, p. 205 ;

2. Salmond, *Jurisprudence*, p. 204 ;

The Counsel for the Princes admit that usage has one set of attributes in international law and another in municipal law. They say that as "the Indian States are not in the international sense independent, but protected by the British Crown, they are not free *inter se* to... form and exhibit a consensus of opinion on any particular usage."¹ So far all right. Their propositions that "In municipal law usage is of itself sterile; it creates neither rights nor obligations.....mere usage cannot vary the treaties or engagements"² were not accepted by the Indian States Committee and properly too. The Princes could not in one breath claim the benefits of both international law and Municipal Law. Usage "shaped and developed the relationship between the Paramount Power and the States from the earliest times, almost in some cases,..... from the date of the treaties themselves"³ Where it "operated to determine questions on which the treaties are silent,"⁴ and proved "a constant factor in the interpretation of these treaties,"⁵ it would be wrong to say that it was devoid of legal efficacy in the absence of consent. To presume consent, at least implied, whenever usage altered the treaty rights of the Indian States, is to indulge in a legal fiction based on certain *a priori* assumptions. It is like arguing thus: Usage rests on consent; its alteration involves consent; treaties cannot be altered by usage unsupported by consent; alterations have been effected by usage, and therefore there must have been some kind of consent. This method of looking at usage ignores the very fact that Paramountcy did not depend on consent. Westlake points out how "in the Indian Constitution an acknowledged supreme will decides every question which arises."⁶ Can the consent theory of usage be reconciled with this view?

According to Holdsworth, "Usage accepted by the Princes is the most important basis of Paramountcy and no alteration in

1. & 2. *Joint Opinion*, para, 5.—(d) (i);

3, 4 & 5. *Buxton Committee Report*, para 40;

6. Westlake, *The Native States of India*, *Law Quarterly Review*, xxvi, 318;

this usage can be effected without the consent of the Princes."¹ Does the efficacy of usage as a source of Paramountcy depend upon whether the Princes accepted it? The premises themselves are inaccurate. How and when did the Indian Princes 'accept' usage as a source of Paramountcy? Holdsworth tries to split up the sources of Paramountcy into two parts so as to have something in support of his theory. He says: "But though the suzerainty of the Paramount Power, which rests on usage and sufferance, does not depend so directly on consent as those parts of it which rest on treaties..... it has its elements in consent."² He seeks to base his argument on safer grounds by distinguishing between two kinds of consent, 'direct' and 'less direct', or rather two degrees of consent, applicable to the two sets of sources of Paramountcy. Holdsworth however does not go to the length of saying that Paramountcy was totally founded on consent.

Julian Palmer explains the character of usage with reference to Paramountcy? "It is in the need for the exercise of some general control that we see the origins of usage..."³ Occasions for intervention are the source of usage; consent is not. Such occasions are also a source of political practice. The decisions of the Government of India and the Secretary of State based on usage constituted political practice and they are held to be "rulings of those who were for the time being entitled to speak on behalf of the sovereign power and rulings intended to govern the action of the authorities in India."⁴ The Indian Princes had to accept what was done. Their rights were progressively diminishing as they were interpreted not in their own language, but in terms of actual practice. The Princes were not consulted when their treaties were being modified by political practice and usage. Holdsworth's view that the Princes have 'accepted' usage does not mean that their consent was sought and obtained. Consent involves the exercise of one's volition before.

1. Holdsworth, *Indian States and India*, L. Q. R. xlv

2. Holdsworth, *ibid.*

3. *Sovereignty and Paramountcy* 44;

4. *Hemchand Vs. Sakarlal*, (1906) A. C. 237.

hand ; approval is a subsequent act. Palmer shows the distinction clearly. " It is true that as regards the attitude of the Indian States to the practice of the Political Department, we are concerned with what is nearer to assent than to consent ; but we think it nearest of all to what we described as mere acquiescence." ¹

On the assumption that usage implies an element of consent, Holdsworth maintains thus : " Neither usage except such a usage as evidences an agreement between a particular State and the Paramount Power, nor a political practice based on decisions of Secretaries of State or the Government of India, are operative to confer any new rights upon the Crown ".² When Holdsworth admits of a ' need ' giving rise to some ' general control ', it is not intelligible how he could also stress on the need of an ' agreement between a particular State and the Paramount Power ' ! When one remembers the number of States whose individual agreements should have had to be obtained before the establishment of that ' general control ', the urgency of which Holdsworth himself recognises, the self-contradictions contained in his theory become evident. Usage was brought into operation as the treaties had become stale and thus unsuitable to a " living, growing relationship, shaped by circumstances and policy " The doctrine of *rebus sic stantibus* correctly explains the part played by usage in affecting treaty rights.

Treaties being static and usage dynamic, the later must necessarily affect the former when occasion demands its application. There are writers like Sen and Panikkar, who, on the hypothesis that usage has consent as condition precedent to its validity, hold that it could not modify treaty relations, unless when based agreement. This means, only a treaty can alter a treaty. This is against facts. Even in law usage is not always founded on consent. " In international law, custom or usage (they are used as the same) is the clear and continuous habit of performing certain actions under the aegis of the

1. *op. cit.* p. 44;

2. Holdsworth, *op. cit.* p. 427.

conviction that these actions are legally necessary or legally right." ¹ What is 'legally necessary' need not necessarily or of right, be 'legally right.' In the name of necessity action may be taken which is not in accordance with agreement. However the adverb 'legally' qualifies the adjective 'necessary', and thus restricts its scope. Were it not so it could have been used as a cover for any action, lawful or unlawful. Still the validity of usage does not depend upon consent; it is a 'continuous habit'. It is not necessary that "customary rules should be founded on consent and that.....the treaties should be shown to have been supplanted by subsequent agreements." ² Usage operated by virtue of emanating, not from the consent of the Princes, but from the superior authority of the Government of India. In municipal law the effect of lapse of time is recognised. It vests and divests rights. The Political Department had acquired a prescriptive right to supersede treaties by usage. No denunciation or mutual consent was necessary. "The obligation of treaties, by whatever denomination they may be called, is founded not merely upon the contract itself, but upon those mutual relations between the two States which may have induced them to enter into certain engagements", ³ observes Wheaton.

Here is the other side. "If we seek to interpret the view of the Indian States, we may say that the first position is the absolute binding power of the existing treaties; that need not be laboured, for on the highest authority it has been declared that these are inviolate and inviolable." ⁴ This absolute binding power exists if only the treaties are 'in force'. It was stated in an Act that "All treaties...so far as they are in force at the commencement of this Act, are binding on His Majesty"; but what is 'being in force'? When political practice and usage had eaten away the very vitals of the treaties, could they be considered as 'being in force'? Changes in

1. Oppenheim, *op. cit.* ; vol. i, p. 22 ;

2. Sen, *op. cit.* pp. 28-29.

3. *International Law*, Chap. i, sect. 4 ;

4. Sir Stanley Reed and P. R. Cadell, *India—the New Phase*,

* p. 54 ;

the conditions obtaining in almost every field of activity throughout the country had told so much upon the treaties of the Princes that to found any claims on them on the assumption that "the legal relationship created by the treaties and engagements cannot be deemed to have suffered any change or modification",¹ is a travesty of facts and a distortion of law. Lapse of time has both historical and legal value.

A word about 'sufferance' as a source of Paramountcy. It is another word for acquiescence. Does acquiescence connote consent? It means tacit submissiveness or abstention from objection. It does not necessarily follow that acceptance of a situation should be based on consent. Assent is not consent. The opinion of the Princes' counsel that it may amount to an acquiescence in respect of particular acts or things, and that it lends itself to an inference of agreement as for the rest, appears like wishful reasoning. In their Communique dated the 2nd December 1944, the Government of India (Political Department) refer to sufferance as having affected treaties. They say: "The interpretation of the text of the.....treaties has long been affected by usage and sufferance and has in the nature of things to be related to the interests of the changing times."² Sufferance necessarily precludes consent.

1. Sen, *op. cit.* p. 32;

2. F. R. Dabhi, *The Indian States and Paramountcy*, p. 1;

CHAPTER XIII

Exercise of Paramountcy.

Paramountcy was exercised by the Crown through the Government of India. Acts of Paramountcy were either acts of Prerogative or acts of State. The distinction between the two was pointed out.¹ The subjects of the States were not the subjects of the Crown and therefore in respect of them the functions of Paramountcy cannot be considered acts of Prerogative. The States' subjects were not foreigners either, to regard such acts as acts of States. Only "those acts of the Crown which are done under the prerogative in the sphere of foreign affairs are known as Acts of State."² Acts of State relate to foreign policy, and strictly speaking, the functions of Paramountcy exercised by the Crown through its agents, cannot be called acts of State. But as the Indian States were, for purposes of British municipal law, 'foreign,' such acts, as affected them, might be called, on grounds of analogy, acts of State. An act of State "is an exercise of sovereign power which cannot be challenged, controlled, or interfered with by municipal courts. Its sanction is not that of law but that of sovereign power, and whatever it be, municipal courts must accept it, as it is, without question."³ Similarly the right to exercise Paramountcy could not be determined by the municipal courts. Its sanction was Paramountcy itself. It is immaterial whether the Crown exercised its Paramountcy as acts of Prerogative or acts of State, because both are not normally justiciable.

The three fields wherein the Crown exercised its Paramountcy are (1) External Affairs, (2) Defence and Protection, and (3) Intervention. On accepting British Paramountcy the Indian States surrendered all powers concerning external affairs such as negotiation, legation, and diplomatic intercourse, including interstate.

1. *Vide* p. 104 *supra* ;

2. Wade and Phillips, *Constitutional Law*, p. 166 ;

3. *Salaman Vs Secretary of State*, 1 K. B. (1906), 639 ;

communication. It was the Crown which represented them in all such matters. It also undertook to fulfil the pre-Paramountcy treaties of the States with foreign powers. A corresponding right was exercised by the Crown to secure due discharge of certain international obligations by the State, such as the surrender of fugitive offenders, suppression of objectionable practices like slave trade, and abolition of immoral traffic in women and children. The Crown assumed the responsibility of ensuring justice to foreign subjects while in the States and compelled the States to pay compensation to them in cases of injury caused to them.

Paramountcy expressed itself most eloquently in the form of intervention. In international law "the checking of sovereignty by the exterior action of sovereignty is known as intervention."¹ But the principles on which this right was exercised by the Paramount Power are different from those which regulate the cases of intervention by fellow States under international law. A question suggests itself. Was the right of intervention a source of Paramountcy or was it *vice versa*? Paramountcy conferred extensive powers on the Crown. It gave it the right to intervene where and how it pleased—"to compel a prince to carry out general reform, to enforce a particular command, to secure the redress of a particular grievance, to send away favourites, to curb extravagance, to effect a change of ministers, and even to compel an abdication."¹ These powers were part of Paramountcy; many of them are not traceable to any treaty or engagement. Can it be said that they were inherent in Paramountcy? Or should we accept the other view that extensive intervention under varying circumstances resulted in the accrual of these right in favour of the Paramount Power? Both have equal claim for acceptance.

That the Paramount Power had inherent rights of intervention can be seen from the reservation clauses in many treaties and *sanads*. In his Minute dated 30th April 1860 Lord Canning had, in unmistakable terms, stated that "nothing will debar the Government of India

1. Stowell, *International Law*, p. viii

2. Schuster and Wint, *India and Democracy*, p. 127.

from stepping in to set right serious abuses in a native Government. In his letter to the Nizam Lord Reading mentioned 'Imperial interests as one of the grounds of intervention. He said, "the right of the British Government to intervene in the internal affairs of Indian States is another instance of the consequences necessarily involved in the supremacy of the British Crown." It is true that in several treaties there are some promises of non-interference. This does not mean that they are absolute assurances. "It seems.....that whatever single expressions and clauses may be extracted from Indian treaties in favour of the absolute right of the protected sovereigns to govern as they please, the treaties and the parties who signed or ratified them have persistently upheld the view that under well-understood but undefined conditions the British Government has a right of interference."¹ Thus the Paramount Power had its rights of intervention secured by its own Paramountcy.

We have seen how the East India Company stuck to a *laissez-faire* policy during the regimes of Lord Clive, Warren Hastings, and Lord Cornwallis. It was the Marquis of Wellesley who advocated intervention. This was a necessary consequence of his treaties of subsidiary alliance. But his interferences in the internal affairs of the Indian States cannot strictly be called interventions by the Paramount Power in the exercise of its Paramountcy, for British Paramountcy dates from a later period. Lord Hastings was not in favour of interventions. It is only from the Governor-Generalship of Lord William Bentinck that we notice the frequent exercise of this right. We may say that throughout its dealings with the Indian States the East India Company adhered to a policy of non-intervention almost consistently, till the advent of Bentinck. Lord Bentinck realised the futility of pursuing the old policy and actually reversed it. The treaties of the Princes could not help them much against the active exercise of the right of intervention. Successive Viceroys made a fairly liberal use of this weapon. They found new causes or excuses for further inroads. The most important ones were those for the benefit of the 'Prince, his State, or India.'

1. Lee Warner, *The Native States of India*, p. 290

But Paramountcy was exercised for other ends also. These other ends were 'imperial' ones. But as long as these were not inconsistent with the interests of the State, or the Prince, or India as a whole, the exercise of the right of interference could be justified, but not so when they were clearly repugnant to the interests of the State or India. Further, the interests of the State were not always identical with the interests of the Prince. Wajid Khan makes out a case against the exercise of Paramountcy for the attainment of aims other than imperial. He complains; 'So long as the power is utilised for the attainment of Imperial aims, as for example, security and defence, it can very well be appreciated;' and he goes on, "but when it is made to serve interests other than Imperial, the position becomes indefensible."¹ Does he mean that Paramountcy could not be used for the purposes of promoting the well-being of the States and the welfare of their people? All-India interests and Imperial interests are not convertible. A clash between the interests of the States and the interests of India at large was also possible. Were the latter to be sacrificed in favour of the former? It is really strange that the exercise of Paramountcy should have been urged to be confined to the 'attainment of Imperial aims', and that there should be a sort of an insinuation made that its employment otherwise, for example in the interests of India as a whole, or on behalf of the people of the States, was an abuse of power. Else, what is the inference when it is said that the position would be indefensible if it was made to serve interests other than Imperial?

The Paramount Power exercised its rights of intervention on several grounds. It did not pay any scrupulous regard to the treaty rights of Princes. There are many treaties wherein the Princes were promised full freedom in their internal affairs. But it was politically impossible for the East India Company to respect the very letter of the treaties. Intervention often meant violation of a pledge. There is a reluctant admission on the part of the Government about its

1. Wajid Khan, *Financial Problems of Indian States*, p. 10,

policy of intervention. At the same time it makes a claim in support of its policy. "Intervention has not been employed in wanton disregard of treaty obligations", says the *Montford Report*. The term 'wanton' is significant. It is an extenuating adjective; for the British Government does not conceal the fact of its having disregarded treaty obligations. It only pleads that it did not do so wantonly.

Whether wantonly or not, the Paramount Power exercised its right of intervention of a general nature common to all the States, distinguishable from those "special or limited rights of intervention peculiar to certain States and which rest on special treaty or usage."¹ These general rights were (1) To recognise and regulate successions; (2) To prevent dismemberment of the State; (3) To suppress rebellion; (4) To prevent gross misrule; (5) To check immoral and inhuman practices; (6) To secure religious toleration.² There were interferences for the economic good of India as a whole, as well as in the exercise of extra-territorial jurisdiction in respect of European British subjects, Cantonments, Railway lands etc.

The Paramount Power claimed a right to settle all cases of succession. Sen contends that "the right to settle disputed successions may no doubt in certain cases accrue to the Crown, but in all such cases the right arises from express provisions of the treaties and engagements or by necessary implications of such provisions; in no case can the right be founded on the extent and nature of Paramountcy."³ It was in the Manipur case that the following principle was enunciated: "It is admittedly the right and duty of Government to settle successions in the protected States of India generally.....Every succession must be recognised by the British Government and no succession is valid until recognition has been given."⁴ Lord Reading claimed the same right when he wrote to the Nizam thus: "No succession to the *Masnad* of Hyderabad is valid unless it is recognised by His Majesty the King-

1 & 2. Lee-Warner, pp. 273-274 ;

3. Sen, *op. cit.* p. 159;

4. Mukerji, *Indian Constitutional Documents*, I, 588;

Emperor; and.....the British Government is the only arbiter in cases of disputed successions." ¹ Lee-Warner says that the existence and exercise of this right long before 1858 "was certainly recognised by all subordinate States under the Mughal and Mahratta rules." ² Keith justifies it : "The Crown could always claim the rights of the Emperor whose approval had been regularly sought and paid for even in the days of his decline, as by the Nizam in 1803." ³

One of Tupper's three cardinal principles of Paramountcy was the 'preservation of the autonomy of the feudatory States'. By autonomy is meant not so much the sovereignty of the State as just a *perpetuation of its status as a separate entity on the principle* "once a Native State, always a Native State." The motives underlying this solicitude have been far from altruistic. The integrity of the States was all along scrupulously safeguarded. 'No Ruler was allowed to bequeath or transfer *inter vivos* any portion of his territory. Heavy incumbrances on the States in the form of charges or mortgages were prohibited. In some cases the administration was kept under direct control. "Owing to financial embarrassment in 1821 the Udaipur State was placed under the direct superintendence of the Political Agent and the Maharaja was given.....an allowance." ⁴ Similarly the Government of India intervened in regard to Kotah when it was in pecuniary embarrassment.⁵ Sirohi State was taken under the direct management of the Government of India in 1854 under like circumstances; ⁶ similarly Dewas (Senior) in 1875. ⁷

The evil consequences of partition of State territories as well as their alienations are obvious. Kathiawar is an exceptionally good example of what division of State territory into metes and bounds among a number of heirs leads to. We see little fragments of

1. Butler Report, *Appendix iii*;

2. Lee-Warner, *op. cit.* 312;

3. Keith, *A Constitutional History of India* p. 215

4. Aitch, Vol. iii, p. 14; 5. *Ibid*, iii, p. 261; 6. *ibid*, p. 151;

7. *Ibid*, iv, 248;

territory littered throughout the peninsula. The rule against partition of State land is defensible ; it is not private property. It is *res extra commercium*. The principle of protecting a State from dismemberment involves a restriction against alienation of State territory, even if it be for service rendered by the intended alienee. Kolhapur State was brought under this restriction, although temporarily, in 1862.¹ Again, earlier, the ruler of Suket was granted a *sanad* in these terms : " The Raja shall not alienate any portion of the lands of the said territory without the knowledge and consent of the British Government, nor transfer it by way of mortgage."² Rulers were not allowed to acquire land, by purchase or otherwise, from other States. There are restrictions regarding their acquisition of real property in other States. Further, to obviate jurisdictional complications involved if they should become proprietors of properties in British India in their capacity as Rulers, they were not, as a general rule, allowed to purchase immovable properties there.

The Paramount Power exercised its right of intervention in the interests of the States, for purposes of suppressing rebellion or insurrection. " The first condition annexed to interference for the maintenance of order is the request of the state for aid, and proof of the need for such intervention.....A second condition is annexed to interference that the British arbitration or aid, when once invoked or granted, must be accepted by the ruling chief without condition or limitation."³ In 1870, by seeking British help against some rebellious nobles, the Maharaja of Alwar actually invited trouble on himself. " He was deprived of power because there was discontent amongst his subjects caused by his extravagance."⁴ Similarly when the Nawab of Cambay applied for military assistance to curb a riotous mob, conditions were imposed on him in these terms : (1) to respect and maintain all titles and claims and all settlements of land revenue ; (2) to seek and follow the advice of the

1. Aitch, vii, 216;

2. Ibid, viii, 394.

3. Lee-Warner, p. 289 ;

4. Aitch., iii, 316 ;

Bombay Government with reference to number (1); (3) to submit an accurate report of the administration every year in the prescribed form; (4) to conform at all times to such advice as the Government of Bombay may offer in regard to any objects connected with the advancement of his interest and the happiness of his subjects; (5) Not to remove the Dewan without the sanction of the Bombay Government."¹ This is an illustration of Paramountcy serving as the source of a treaty. But the Paramount Power would not intervene to suppress any rebellion against a Ruler when it was Provoked by the misconduct of the latter. It refused to suppress a revolt of an oppressed people. "The British Government" says a despatch, "have the paramount obligation.....of protecting the people of India from oppression."²

The fourth consideration for intervention was the prevention of 'gross misrule.' This was rendered necessary as a result of the exercise of Paramountcy against the people in cases of their revolt. When the Princes were promised protection against popular agitation, there had to be a corresponding right exercised by the Paramount Power for the benefit of the subjects. "The right of the British Government to intervene in the internal affairs of Indian States is another of the consequences necessarily involved in the supremacy of the British Crown.....The internal no less than the external security which the ruling Princes enjoy, is due, ultimately, to the protecting power of the British Government, and where imperial interests are concerned, or the general welfare of a people of a State is seriously and grievously affected by the action of the Government of the State, it is with the Paramount Power that the ultimate responsibility of taking remedial action, if necessary, must lie."³ Some cases of 'flagrant misgovernment' were drastically dealt with and deterrent punishment meted out to the guilty Princes.

Where "there is gross misrule, the right, or the duty, of intervention arises, notwithstanding any pledges of unconcern or

1. Aitch., vii, 58.

2. Tupper, *op. cit.* p. 115;

3. Sydney Lee, *King Edward vii*, Vol. ii, 365.

"absolute rule" which treaties may contain."¹ It was also maintained that "intervention.....has only been accorded where the circumstances were exceptionally grave, and misgovernment both long continued and gross."² Sen credits Lord Dalhousie with having admitted that "the only case in which the British Government were legally competent to intervene in the internal affairs of the State of Hyderabad was when the effect of mis-government was felt beyond the boundaries of the Hyderabad State, and the safety of British India was placed in doubt."³ He quotes the following words of Dalhousie: "So long as the alleged evils of His Highness' Government are confined within its limits, and affect only his subjects, the Government of India must observe religiously the obligations of its own good faith"³ But there is a significant clause in the same passage. The Government of India "has no right to enter upon a system of direct interference.....which is unsought by the people"³ of the States. When therefore intervention was sought by subjects suffering under a Ruler, there could be no excuse for not exercising the right of interposition. This is an answer to Sen as well as to Julian Palmer who says: "The Paramount Power has no power to interfere in the internal administration of a State even when by misgovernment absolute chaos has been introduced in the administration of the State."⁴ Further, Dalhousie's opinion on intervention cannot be accepted as the normal view of the Paramount Power. He was for a policy of unconcern. He was more an annexationist than an interventionist. If he had advocated intervention it would have gone entirely against his grain. He was not keen on corrective interference.

There are numerous instances of intervention to end 'gross misrule'. But it was not always necessary that there should have been 'long continued, gross misrule!', to warrant intervention. That the Crown could interfere in case not only of misfeasance of a serious nature, but also in cases of non-feasance, can be seen from a recent-

1. & 2. Lee-Warner, *op. cit.* p. 291 212.

3. Sen, *op. cit.* p. 161:

4. Julian Palmer, *op. cit.* p. 90.

instance. The Maharana of Udaipur, whose treaty gave him complete autonomy in domestic matters, was forced to abdicate, not on account of misrule but on the charge of 'no-rule'. His was not a case of positive mis-government. It was on the following grounds that intervention took place; "that education in the State was quite backward; that roads and irrigation were neglected; that currency was not stabilised; that there were disputes between the State and the Thakurs; that criminal trials were dilatory; that subordinate officials were low paid; that the central hospital was out of date and that the dispensaries in the State were too few."¹ In fact the State could as well have been annexed for being 'out of date.' The grievances or complaints read like a formidable charge-sheet. Could there be a more exhaustive list of the grounds of intervention?

Intervention had to be resorted to in many cases to put an end to 'barbarous practices such as *sati*, or infanticide, or to suppress torture and barbarous punishment.'² Some Rulers had undertaken to carry out certain social reforms and abolish social abuses. The Rao of Cutch had undertaken to "abolish the practice of infanticide, and to join heartily with the Company in abolishing the custom generally known through the Bhayads of Kutch."³ The Rulers of Nabha, Jind and Patiala, had engaged to prohibit 'suttee, slavery, female infanticide'⁴ etc. Intervention on the score of suppressing these evils and others of a like nature, was resorted to even when treaties were silent as to the Rulers' obligations concerning their abolition. Cases dealing with the Government's intervention under this category belong more to the social history of India than to Paramountcy proper. The point to be noted is that in the name of justice and equity, the Paramount Power greatly extended its intervenient rights.

The Paramount Power intervened to secure religious toleration also. The Maharaja of Jodhpur was made to undertake that

1. Latthe, *Problems of Indian States*, p. 32;

2. Indian States Committee Report, para 53;

3. Aitch. vii, 788;

4. Aitch., viii, 200 ;

"tyranny or oppression shall not be suffered towards any person. He agreed to the following effect: "No interference shall be exercised in regard to six sects of religionists."¹ The Paramount Power showed special solicitude for Christian missionaries. When the Maharaja of Indore claimed a right to enforce certain regulations against the Canadian Missionaries, "Lord Ripon informed His Highness that he could not permit them to be interfered with 'in the exercise of personal and religious freedom.' It is true that in this case the Missionaries were British subjects, but the immunity against persecution was claimed not only for themselves but for their converts and dependants."² Toleration to facilitate proselytisation! Lord Minto's criticism of the Missionaries and their work, as early as in the year 1807, is refreshingly frank: "The sole effect of their effort was not to convert, but to alienate the professors of both religions prevalent amongst the natives of this country..... Read the miserable stuff addressed to the Hindus, in which the pages are filled with hell fire, denounced, against a whole race of men for believing in the religion which they were taught by their fathers and mothers."³ The motive underlying conversion, to promote which the Company laboured hard under the mask of religious toleration, is evident from Minto's statement: "I do not think we should be justified in refusing the dispensation of the Christian revelation to this great country for our interest or security, but I am not equally ready to sacrifice the great interests which are confided to me."⁴

It is said that "other rights of interference are in special cases secured by Treaty."⁵ Lee-Warner regards that the general right of intervention was confined to the five instances mentioned above. It does not follow that where there was no special power to intervene under a treaty and where the occasion did not come under any of the five cases warranting general rights of

1 Aitch., iii, 169;

2. Lee-Warner, p. 296.

3. & 4. Ramsay Muir, *The Making of British India*, p. p. 252.

5. Lee-Warner, *Protected Princes of India*, p. 297.

interference; the Paramount Power was obliged to remain aloof. Latterly there were occasions for inevitable intervention which could not have been anticipated either when the various treaties were concluded or when Lee-Warner made his list of subjects wherein independently of treaties the Paramount Power was bound and entitled to step in. "There are limitations to the policy of non-interference. Even in the great homogenous States their interests impinge on those of British India. Trunk railways often traverse their territories; the telegraphs and posts are interlocked; the currency policy of the Government materially affects their welfare. More recently there has arisen the competition of ports in the maritime States with those in British India. An additional complication was raised when British India deserted the fiscal practice of tariffs for revenue purposes and embarked on a policy of discriminating protection."¹ Again, "British India was fast becoming protectionist, and the tariff wall was growing higher every year. To suggest that the Paramount Power took into consideration the interests of the States before yielding to the pressure of the Indian Legislature on this issue would be to give expression to an inexactitude. To affirm that the States were individually or collectively consulted on the subject, is to indulge in a cruel cynicism."² Although these are matters pertaining to economics and commerce, it can be seen how the Paramount Power exercised rights adversely affecting the States without any treaty or agreement. *Railway, postal, and telegraphic matters, were partly governed by treaties; where there were no agreements, action was first taken and an agreement was subsequently entered into.*

The Indian States Committee stated that "The Paramount Power will also intervene if the ruler, though not guilty of misrule, has been guilty of disloyalty or has committed or been a party to a serious crime." The Gaikwar of Baroda was tried for disloyalty, by a special commission. The Ruler of Manipur was punished on the charge of

1. Reed and Cadell, *India*, p. 52;

2. A. Krishnaswamy, *The New Constitution of India*, p. 18

murder of British officers. The Ruler of Bharatpur was deposed as he had killed one of his private servants.¹ Abdication was the penalty which the Holkar had to pay for his complicity in the Bawla murder. The Nawab of Tonk was deposed under similar circumstances.² The Rulers of Jhabua³ and Porbunder⁴ had to suffer loss of rank and powers on the ground of cruel conduct.

The Paramount Power often intervened on behalf of Feudatories of the Princes against the latter's encroachments. In 1862 the Maharaja of Kolhapur was made to execute a treaty to the effect that he would "follow the advice... of the Political Officer.....and respect the jurisdiction of his subordinate Jagirdars."⁵ "Residuary jurisdiction over the Feudatory Jagirdars" was vested in the Resident till very recently. The Feudatories of Kashmir were directly placed under the control of the Resident. The Paramount Power intervened to save the Gujerat and Kathiawar Feudatories of the Gaikwad from his annual harvest-time raids.⁶

The Paramount Power does not seem to have given sufficient heed to the interests of the people of the States in matters of intervention. The Butler Committee boast of the infrequency of interventions: They say: "In.....ten years.....only eighteen cases. No bad record this" But where is the record of the Crown's refusal to intervene, unmindful of the legitimate grievances of the States' people?

1. Aitch. II, 263; 2. *ibid*, III, 227; 3. *ibid*, IV, 475;
4. *ibid*, VI, 991; 5. *ibid*, VII, 216; 6. *ibid*, VI, 360.

CHAPTER XIV

Locus and Nexus of Paramountcy

The Paramount Power was "the Crown acting through the Secretary of State for India and the Governor-General in Council who were responsible to the Parliament of Great Britain."¹ Here what does *who* stand for? Does it include "the Crown"? All the rights of the Paramount Power were exercised by the Governor-General who was responsible to the British Parliament. The Government of India acted under the control of the Secretary of State. It acted on behalf of the Crown, and was answerable to Parliament. Was not the Crown, as the Paramount Power, responsible to Parliament, when its secretary, the Secretary of State for India, and its agent, the Governor-General in Council, were? Was the Government of India responsible to Parliament without being responsible to its principal, the Crown? Or was it responsible to both? If Paramountcy was the indivisible authority of the Crown over the Indian States, it is hard to reconcile the Crown's irresponsibility, with the responsibility of the Government of India, to Parliament, in respect of one and the same thing. Either Paramountcy lay within the ambit of Parliamentary regulation so that the Crown also, as Paramount Power, was answerable to Parliament, or, the Crown in respect of its Paramountcy, was not amenable to Parliamentary control. If the latter proposition is accepted, the non-responsibility of the Crown to Parliament and the responsibility of the Crown's agents to the same, appear paradoxical.

The Crown cannot be at one and the same time sovereign and non-sovereign. In respect of Indian States it was not a sovereign, but a Paramount Power. Could this Paramount Power be non-sovereign *vis a vis* the Indian States, and sovereign *vis a vis* Parliament? Really speaking the "Crown is not the legal sovereign.....The executive is not the Sovereign."² The Crown is not the

1. Butler Committee Rpt, 18.

2. Buckland, *Reflections on Jurisprudence*, p. 108.

"uncommanded commander" How could a non-sovereign Crown be the ultimate seat of Paramountcy? Just in respect of Paramountcy could the Crown, as the Paramount Power, be considered as a Sovereign Paramount Power? According to the learned counsel for the Princes, the Crown as Paramount Power, was "the head of the executive Government of the United Kingdom under the constitutional control of the British Parliament."¹ There is an admission of its subordination to Parliament. Is it possible to say that the Crown, in its capacity as Paramount Power, was sovereign, and that in its capacity as Sovereign of British India, non-sovereign? The Princes never accepted the Crown as sovereign. As their spokesman puts it, "Paramountcy of the British Crown is essentially and fundamentally different from its sovereignty in India.....Paramountcy.....is not a necessary incident of the sovereignty of the Crown"² When the Crown was responsible to Parliament even when it was sovereign (not Sovereign) in the executive sphere, how could it have been independent of Parliament in respect of its Paramountcy, which is not full-sovereign authority. Therefore, Parliament was the ultimate Paramount Power.

It was all along the Government of India which exercised Paramountcy rights. If the Crown was the final authority in matters pertaining to its Paramountcy, was it so as the King of the United Kingdom or as the Emperor of India? The admission of the Princes' counsel that the Crown, as Paramount Power, was under the constitutional control of the British Parliament, is qualified to some extent. They speak of the Crown, the Paramount Power, "as the head of the executive government of the United Kingdom." This makes it appear that the Crown, as Emperor of India, or in its dual capacity as King-Emperor, was not the Paramount Power. Do the assumption by the Queen of the Imperial Title in 1877 under the Royal Titles Act, and the declaration of the Crown's suzerainty by the Interpretation Act of 1889, mean nothing? It would be strange if the Crown should be treated as having acted as Emperor or Empress towards British India only, and as King or

1. *Opinion*, 7 (i);

2. *Sen, op. cit.* p. 156.

Queen towards the States which came within the compass of "India."¹ Therefore, the term 'Crown,' for purposes of determining the locus of Paramountcy, means the Crown as sovereign of India, but not in its composite character as King-Emperor, and much less in its domestic capacity as King of the United Kingdom.

The Government of India was more than a mere agent of the Crown. Powers of Paramountcy were acquired by it in its dealings with the Indian Princes, without reference to the Crown. It was the *immediate* Paramount Power. To contemplate two Paramount Powers, ultimate and immediate, may appear queer. But the Government of India was not just a channel or medium of Paramountcy. It was an *intermediate* authority between the Crown and the Indian States.

The word 'Crown' does not signify the human personality of His Majesty the King. It is an *impersonal* institution, a corporation sole, acting through its accredited representatives. The Indian Princes made capital of their personal loyalty to the King-Emperor. But Paramountcy demanded something more than personal sentiments. The duty of the Princes was the unswerving 'loyalty of allegiance' to the Crown. It meant not only a personal attachment, but also, and essentially, "an abiding loyalty to the Throne."² If the Paramount Power had insisted on mere loyalty, it would not have so effectively conveyed the meaning of the obligation. 'Allegiance' is a more expressive word. It stands for a duty of obedience. It includes loyalty too. In law 'allegiance' will mean a duty which is imperative and not towards a private individual. 'Crown' is not just a figure of speech, a metonymy, signifying the King in his person. The Princes' duty of allegiance was to the Crown as a legal entity.

Was the Government of India the Paramount Power? The view advanced by the Princes may be examined. According to one of their supporters, "This Paramountcy is not that of the Government of India, but of the Crown, and that by a *persona*, the Governor-General that presides not over the Government of

1. Interpretation Act, 52 & 53, Vict., c. 63, Sn. 18 (5).

2. Gundappa, *op. cit.* 23.

India, but over the Crown's relationship with the States."¹ The author must be thanked for not having described the *persona* as the Viceroy, which could naturally be expected from one taking such a stand. This theory is fallacious. Paramountcy was exercised by the Governor-General in Council, not by the Governor-General. In actual practice it was the Governor-General who was in charge of the States' portfolio. But this makes little constitutional difference. Then there is Palmer "locating the Paramount Power as the King of England."² He considers the Government of India as just an agent which acted on behalf of the Crown. Palmer's view is less defensible than the view of those who speak, not of the 'King of England', but of the British Crown, as the Paramount Power. The latter term is more comprehensive and less defective. The correct description of the Paramount Power would be the 'Crown as Sovereign of British India'.

It is because the Governor-General personally dealt with the States that the Indian Princes claimed that the Crown, as King of England, was the Paramount Power. The Governor-General was more the representative of the King-Emperor than of the King merely. The British Crown functioned through the Governor-General in Council throughout India. Because the Governor-General individually presided over the Political Department, it does not follow that he was the King's personal representative in respect of the States. He was the Governor-General of the whole of India. "Were the States part of the Crown's Kingdom to say that to them the Crown represented the King of England?"³ Clearly not. The doctrine of the divisibility of the Crown has been established for many years past. It had its genesis in the foreign policy of the Crown since 1912.⁴ We may, with Tennyson, say, it "fulfils itself in many ways." Its manifestation as King-Emperor corresponded to its authority over two distinct parts of the British Empire—including the Indian States.

1. MacMunn, *The Indian States and Princes*, p. 163.

2. *Ibid.*, 433;.

3. Keith, *The King and the Imperial Crown*, p. 438;

4. *Ibid.*, 433;

The Crown was the Emperor of India. This "Crown", with reference to India, reveals plurality in its unity. It was endowed with two distinct attributes, Sovereignty in British India and Paramountcy over the Indian States. The Paramount Power, therefore, was not the Crown as King of the United Kingdom, but the Crown as Emperor of India. Else the Imperial title pompously proclaimed by the Government of India and warmly welcomed by the Princes, would be meaningless.

The Princes tried to establish that they had nothing to do with the Governor-General in his capacity as the executive head of the Government of India. "In the administrative fabric, the States deal with the Viceroy as the King's vice-regent, not with the Governor-General in Council, the fount of authority in India on all other questions. The Viceroy is his own Minister for political affairs."¹ It has been pointed out that "at all events, in all official communications, Government's decisions, communicated to the States come in the name of His Excellency the Viceroy and not in the name of the Governor-General in Council."² A statement made in Parliament by the Secretary of State during the course of a debate on India, will serve as a reply to this argument. It was stated that " 'Viceroy' is a term which has never been used in a Statute or in the Warrant of appointment; it is a term of courtesy not of law."³ Queen Victoria used the term with reference to Lord Canning as "Our Viceroy and Governor-General."⁴ Canning was in a sense 'Viceroy,' as he was the representative of the Queen in India. But this does not mean that he had two personalities. He was the 'Viceroy' or Queen's representative for the whole of India. This does not warrant a conclusion that the Governor-General, for purposes of the Indian States, was *just* a Viceroy.

The following passages from two authoritative exponents of the subject are instructive. In his "Indian Studies," Sir O'Moore,

1. Reed and Cadell, *India - The New Phase*, p. 55;
2. Haksar, *The Indian States and Federation*, p. 12;
3. *Parliamentary Debates*, vol. 298, col. 255-251.
4. Proclamation

Creagh says : " I do not know what under the English Constitution a Viceroy is. The term, as it refers to the Governor-General of India, originated in the Proclamation of 1858. Its use facilitated the practice of the Governor-General acting under instructions of the Secretary of State without his Council." Similar observations are made by Sir William Hunter in the Imperial Gazetteer. " The designation Viceroy, although most frequently used in ordinary Parlance, has no statutory authority and has never been employed by the British parliament.....The title..... appears to be one of ceremony which may most appropriately be used in connection with the State and social functions of the Sovereign's representative; for the Governor-General is the sole representative of the Crown in India. " " The Crown acted through the Governor-General; alone, never through any distinct ' Viceroy ' .

When the extreme step of deposition of a Prince in cases of flagrant misdemeanour or crime was taken, the authority who did this was the Governor-General. Commenting on Curzon's claim that he exercised prerogative powers as Viceroy, Montmorency says ; " The view that he acted as Viceroy exercising a prerogative of the Paramount Power, and that he would assign to the Secretary of State, for India the comparatively unimportant role of somebody to be consulted, does not fit in with the constitutional position that action in such a case would be taken by the Governor-General in Council, and not the Viceroy." ¹ That the term Viceroy has no legal connotation is pointed out thus : " It is perhaps, an indication of status, rather than a term of law..... In law and in practice, the Crown always dealt with the States through the medium of the Governor-General in Council and not that of Viceroy. The fact that every Governor-General invariably held the Foreign and Political portfolios did not legally differentiate him in that regard from any member of his executive council. All decisions in respect of States ran in the name of the Governor-General in Council." ² Till April 1937 the Governor-General in Council was the agent of the Crown, and not the Viceroy.

1. Montmorency, *Indian States and Indian Federation*. p. 65.

2. *Ibid.*

If it is accepted that it was the Government of India which was the agent of the Crown, as distinguished from the Viceroy whose existence was never recognised by law, the alleged 'direct relations' of the Princes with the Crown can easily be proved to be untenable. Throughout the two hundred years of Indo-British relations, the Indian Princes had nothing to do with the British Crown 'personally' or 'directly.' In the Company era, they were dealing with the Company's Government of India, and in the Crown era, with the Crown's Government of India. In no treaty is the British Crown a party; nor was any treaty concluded wherein the Crown may be regarded as an undisclosed principal. In any case the relations were all through with the Government of India.

The status of the East India Company needs examination. It was with the Company that the Indian Princes entered into political relations. Did they become the 'subordinate allies' or 'feudatories' of the British Crown through the Company, or of the Company itself? Did either the Company or the Princes purport to treat the Crown as a party? Was there any legal bar for the Company to deal with the States in its own right without reference to the Crown, or was there any reservation in any of the treaties requiring the ratification of the Crown? Did the Crown's control over the Company mean that whoever dealt with the latter, dealt with the former? At any rate, were the relations, granting that they were with the Crown, direct? Assuming that the Company was just an agent of the Crown, did this derogate from its sovereignty in India vis à vis the Indian Princes?

Raghubir Singh examines the theory of direct relations from the point of view of the Princes. He traces the various stages through which this claim was advanced, beginning with the letter of Sir Tukoji-rao Holkar. The Ruler of Indore wrote to the British Government thus: "It is necessary to invite full attention to the basic truth that His Highness' treaty relations are with the British Government maintained in India by His Excellency the Viceroy as the representative of His Majesty."¹ To call the Government of India one with

1. Raghubir Singh, *op. cit.* pp. 167-170.

which no treaty relations were established, and to say that such relations were established with 'the British Government maintained in India' is to disclose ignorance of history and law. It is the Government of British India and not a 'British Government maintained in India' that the lawyers know of. "It is one thing to say that the relations are with the British Government" (not 'maintained in India') says another writer. "But", he adds, "it is wrong, on that account, to maintain that they are independent of the Government of India."¹ In the opinion of Keith, "The relations of the Native States, however conducted, are essentially relations with the British Crown and not with the Indian Government."² But what was this Crown? It was not the King of England in this context. It was the Crown in its right of India. The British Crown may symbolise or represent Imperial unity in international affairs; but its constitutional plurality must be recognised. As pointed out by Evatt, "all the prerogatives of the Crown in relation to South Africa are capable of being distinguished and separated from those in relation either to the United Kingdom, or to the rest of the Empire, or to other self-governing Dominions."³ The Princes spoke of personal relations also. When the relations were with the Governor-General in Council, how could they be in any sense 'personal'. Assuming that they were with the Crown, no personal element was involved. Personal regard for the King-Emperor is not the same as allegiance to the Crown. "The Counsel for the Princes refer to 'mutual faith and personal loyalty' as required by Paramountcy obligations. They regard the position of the Crown in its contracts with the States "as comparable to contracts in municipal law made in reliance on the personal capacity and characteristics of one party."⁴ The Indian States Committee only say that "the treaties, engagements, and *sanads* have been made with the Crown." They do not say anything regarding 'personal' relationship. The Princes' counsel

1. Kulkarni, *Indian States*, p. 66 ;

2. *Constitution, Administration, and Laws of the British Empire*, p. 250;

3. Evatt, *The King and His Dominion Governors*, p. 313 ;

4. Counsels' Opinion, para 7.

too did not say that the nexus was personal. They held that it resembled one.

The relationship was with the Government of India and it was real. "The treaties do not create a mere personal right or obligation, but impose obligations on the rulers for the time being of Indian States in favour of the authorities for the time being of the Government of India."¹ The writer goes further. "One provision which clinches the matter beyond doubt is the provision in section 20, clause 2, of the Government of India Act (1915), according to which the revenues of India include all tributes in respect of any territories which would have been receivable by, or in the name of, the East India Company, if the Government of India Act of 1858 had not been passed." He concludes; "There is no clearer proof of subordination to, or of the nexus with, the Government of India than the payment of the tribute."² While criticising the theory of direct relations, Ruthnaswamy refers to the legal flaws in it. "The Indian Princes and their advisers have begun to press into their service the theory that their treaties.....were entered into with the Crown.....Whatever political reasons there may be for this *démarche*, it would be difficult to find constitutional justification for it"³ But this next argument lacks force. "The treaties have always been put into execution by the representative of the Crown in India."³ The Princes never disputed this; nor is the fact of "putting into execution" in any way a test to be applied. Who executed the treaties? Were they direct, personal, and thus non-assignable? It is said: "The relations of the Indian States have been all along with the rulers of British India; the Crown is Paramount not because he is the King of England, but because it is in him that the Government of India is vested. It is the Government of India which is the Paramount Power as far as the Indian States are concerned."⁴ But the subordination of the States to the Government of India would not make the latter the *ultimate* Paramount Power.

1 & 2. P. S. S. Aiyer, *op. cit.* p. 213.

3. Ruthnaswamy. *The Revision of the Constitution.* p. 128;

4. G. N. Singh, *Indian States & British India*, p. p. 94—96.

The parties to the original treaties were the Rulers of Indian States and the East India Company. Sen contends that the latter was "an agent or delegate of the Crown; rights acquired by it vested in the Crown *ab initio*."¹ Was that the understanding at the relevant time? Assuming that the Company was the Crown's agent or trustee, does it follow that the Crown's rights enured to the benefit of the Indian States. If the Crown is entitled to the acquisitions of its subjects in certain cases, it does not mean that when the subjects act as a sovereign body, they represent the Crown. That "The History of British India illustrates the doctrine that, no subject of the Crown can acquire dominion except on behalf of the Crown,"² is true. But the question is, was the East India Company a 'subject' or a sovereign power?

The East India Company had acquired the attributes of a territorial sovereign by its obtaining the *Diwani*. It had established its Courts with jurisdiction over all persons living in areas under its government. It is significant that the Supreme Court of Calcutta should have assumed jurisdiction over subjects born after 1757 (Plassey year) in Calcutta.³ A servant of the East India Company was not recognised as a British subject.⁴ "The law established in a number of early decisions was that the man who entered the service of the East India Company necessarily lost his domicile and acquired one in India, on the ground that the Company was in a great degree a separate and independent government foreign to the Government of England."⁵ It was held in another case that "the Company acted as an independent State."⁶ Macmunn holds that the "East

1. G. N. Singh, *op. cit.* p. 95;

2. Jenkyns, *British Jurisdiction beyond the Seas*, p. 41;

3. *David Killican. Vs. Juggernaut Dutt*, Per Impey, C. J. Morton's Decisions of the Supreme Court; p. 119; (dated, 27 1-1777).

4. *Rex Vs. Francisco Jose, alias Joseph Moore*, Morton, 218;

5. Cheshire, *Private International Law*, 168;

6. *The Nawab of Carnatic, Vs. The East India Company*, 2 Vesey Rep. 56, (1792.)

India Company became a Crown in commission"¹ and that it acted in the scope of its commission. This is based on the assumption that the Company was an agent only. In this connection, here is a passage from Burke: "High powers were given to the East India Company so that when it had acquired them all (including powers of peace and war—those great high prerogatives of sovereignty), which it did about the end of the reign of Charles the Second..... it did not seem to be merely a Company formed for the extension of British commerce, but in reality a delegation of the whole power of sovereignty and Kingdom sent to the East. In that light the Company began undoubtedly and ought to be considered a subordinate sovereign power—that is, sovereign with regard to the objects which it touched, and subordinate in regard to the power whence this trust derived. The constitution of the Company began in commerce and ended in Empire."² It began its treaty career with the Princes from the year 1723 when it had transformed itself into a State as it were. That the Company was not liable as an ordinary corporation but that it was a sovereign body was held from time to time; the substance of decisions in these among other cases, is to that effect; *Yashodabai Saheba Peishwa Vs. East India Company*,³ *Ex-Rajah of Coorg Vs. East India Company*;⁴ *Advocate General Vs. Richmond*.⁵ The Company claimed and exercised extra-territorial jurisdiction also; its court possessed Admiralty jurisdiction as held in *The Queen Vs. Anthony Scalan*.⁶ Similarly we have *Gibson Vs. East India Company*,⁷ *Elphinstone Vs. Bedree Chand*,⁸ *Rex Vs. Shaik Booden*,⁹ *Dhakji Vs. East India Company*,¹⁰ and *Rajah Saligram Vs. Secretary of State*.¹¹

1. Macmunn; *op. cit.* 23;

2. Abhyankar, *Theory of Direct Relations*, pp. 3—4;

3. 1 Taylor and Bell, Eq. 290 (1850);

4. 29 Beav. 300 (1860);

5. Perry's Oriental Cases, p. 566, (1845);

6. Montriou, 210, (1846);

7. 5, Bing. N. C. 262,

8. Knapp, P. C. 316;

9. Perry, 457;

10. Perry, 355;

11. 13, Moo. P. C., 355.

The right of the Crown to the territories acquired by the Company has been discussed in a good number of cases. That right was indefeasible inasmuch as the Company was not independent *vis à vis* the Crown. In the Tanjore case¹ the matter of dispute was whether the Company's seizure of the property of the Rajah was an Act of State or whether it should be held to have been a holding of property in trust for those who by law might be entitled to it. It was held that the sovereignty and territory of Tanjore lapsed to the Company in trust for the Crown. That the Company, although sovereign, was also an agent or delegate of the Crown, has been the finding in some cases²; but this does not detract from its sovereign status in respect of the Indian States. The right of the Crown over the territorial acquisitions of its subjects arises independently of its participation either in actual territorial occupation or treaty making. As principal, it is entitled to the benefits of what its agents do; but the Company, it must be said, was a sovereign power in India. It was moreover the agent of the Crown *mediately*, as it was the Court of Directors which was the directly controlling body. "The Company Government entered into political relations with them (the Indian States) not as a mere trading corporation, not even as an agent of the British Government. It did so by virtue of its pre-eminent position as the ruler of a considerable part of India."³ Sir Sivaswami Aiyer has lucidly summed up the matter: "The theory of a *vinculum juris* between the Indian States or Princes and the British Sovereign otherwise than in his capacity of Sovereign of British India has no basis in constitutional law..... The treaties were entered into either with the East India Company in their sovereign capacity acting on behalf of the Crown, or the Governor - General in Council acting on behalf of the Crown. In either case, the Crown acted not in a personal capacity.....but in the capacity of ruler of British India."⁴

The Crown's assumption of the Government of India in 1858 did not bring the Princes in any constitutionally closer relation

1. 13, Moo. P. C. 22, (1859);

2. *Lachminarayan vs. Raja Partap Singh*, 2. All. 1,

3. *Nambyar, op. cit.* p. 128; 4. P. S. S. Aiyer, *op. cit.* p. 211.

with it. There was a substitution of the Secretary of State for the Board of Control. The Governor-General was responsible to the Parliament through the Court of Directors and the Board of Control, and the object of assumption of direct government was to create one governing body responsible to the Crown, to Parliament, and to public opinion. Lord Palmerstone, while commending the Government of India Bill, which became the Act of 1858, stated that "*in accordance with the principles and practice of our constitution..... India..... should be placed under the direct authority of the Crown, to be governed in the name of the Crown, by the responsible ministers of the Crown sitting in Parliament and responsible to Parliament.*"¹ The 'trusteeship' of the Company was terminated. The transfer did not alter the position of the Princes. It did not establish any personal nexus between them and the Crown. The reason for using the word 'Crown' was given by Viscount Palmerstone: "The name of the Sovereign of a great Empire like this must be far more respected, far more calculated to produce moral and political impressions, than the name of the Company of Merchants.....The respect they (Princes) feel and the allegiance they yield will increase tenfold if one were given and the other tendered to the Sovereign of a great and mighty Empire."² The phrase 'Transfer to the Crown' was expected to have a magic effect upon the monarchical sentiments of the Indian people and the personal gratification of the Princes' vanity. Its legal effect on the nexus between the Princes and the Government of India was nothing.

Except for the fact that the Crown undertook to respect the treaties and other obligations of the Company and the Queen proclaimed that the Governor-General was her Viceroy, there was no material alteration as far as the Princes' relations with the Governor-General in Council were concerned. The Statutory Commission recommended the creation of a separate post of a Crown Representative.³ The Indian States Committee said the same thing.⁴ The

1. & 2. Memorandum of the Indian States' people, pp. 8-9.

3. Simon Report, Vol. ii, para 229;

4. Butler Report, para 67;

White Paper proposal stated that "the powers vested in the Crown in relation to the States.....will be exercised by the Crown's Representative as Viceroy.¹ The Government of India Act provided for the creation of the new office.² The result was two 'Viceroys', namely, Viceroy and Governor-General, and Viceroy and Crown Representative; for both the Governor-General and the Crown Representative, were 'Viceroys' inasmuch as they represented the Crown's Sovereignty and Paramountcy respectively. It was only under the Act of 1935 that the Princes came under the Paramountcy of the Crown through its new Representative, dealing with the States exclusively. The incidents of this appointment are brought out by Latthe: "This procedure would be worse than what it is today. Autocratic as it is now, the Political Department would be still more undiluted autocracy. The Indian Ministers are to have no voice in the decisions to be arrived at by the Viceroy, as they would represent British India and the Princes are supposed not to like their countrymen.....The theory of direct relations makes a united India impossible except under foreign domination."³ To cite another writer: "The Government of India Act, 1935, that sought to make the Crown Representative its sole delegate for discharging the functions of the Crown in relations to the States, conferred on the Governor-General at the same time exclusive powers in respect of defence and external affairs..... The sinister attempt to divorce the seat of Paramountcy from the Governor-General became largely illusory..... The principal fields of Paramountcy were therefore vested in the Governor-General..... The Crown Representative became the dignified half of the Crown in relation to Paramountcy. The Crown in the right of Paramountcy was the Crown in the right of the Government of India."⁴ The bond thus remained unsevered.

The relations were therefore 'indirect', impersonal' and through the Government of India, which was not only an agent of the Crown but also a repository of Paramountcy. Even the assumption,

1. White Paper, 15—3—1933, page 192;

2. India Act. sec. 3;

3. Latthe, *Problems of Indian States*, p. 23.

4. Nambyar, *Federal Law Journal*, Oct. '47.

of the Imperial Title by Victoria which was "designed to bring her into relations of a personal character with the Indian Princes",¹ could not in any way operate on the impersonal relations long established between them and the Government of India. There was nothing like a substitution of the personality of the Crown for the machinery of the Political Department of the Government of India. Its position was that of an agent in its dealings with the Crown, and that of a Paramount Power in its relations with the Princes. Joshi succinctly and concisely states the position: "The transfer (1858) was formally to the Crown, but in reality it was to the British Parliament. The legal position was not altered At no time before 1876 had the Princes any personal relationship with the Crown?..... It is only after the Queen assumed the title of 'Empress of India' that the personal element..... may be said to have begun. But in practice the Crown meant the Secretary of State.....The fact that there may be personal relationships between His Majesty and an Indian Prince does not alter the fact that there is also personal allegiance of British Indian subjects to His Majesty. From the early days of the Company, it has been the Government of India alone which has dealt with the Indian Princes and Indian States."²

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1. Keith, *England from Victoria to George VI*, Vol: I, p. 153:
 2. Joshi, *The New Constitution of India*, pp. 101-102.

CHAPTER XV

Obligations arising from Paramountcy.

Paramountcy involves rights and duties. The test of any legal obligation is liability to a sanction. "If any one can impose duties on one, the latter is not Sovereign, according to Austin.....Jellinek's 'auto-limitation' is merely a phrase,—there is still only voluntary submission, not liability."¹ An obligation need not involve imposition of a duty by some other person. It may be voluntary and not necessarily enforceable. In the absence of any sanction, such a duty is at best what Salmond would call, one of 'imperfect obligation.' Austin's theory that the Sovereign owes no duty, is not accepted by many. "Sovereignty does not preclude the notion of obligation, but only the notion of limitation by a power external to itself.... We cannot refuse to describe the sovereign's liability as a legal duty on the ground that the sanction is self-imposed."² If Sovereignty is compatible with the notion of duty, Paramountcy is more properly so. As pointed out, "The Crown is not the Austinian Sovereign, the supreme legislature.....No action would lie against the Crown in Parliament or executive, in respect of things done under and within the authority of an Act of Parliament."³ The test of an obligation need not be the existence of a right of action. The Crown, as Paramount Power, was not the sovereign, in the legal sense of the term.

The obligations of the Paramount Power were more or less of a voluntary nature. Treaties and other instruments are evidence of such self-appointed tasks. There is a difference between responsibilities which the Paramount Power undertook and the duties which the Princes claimed from it. The Paramount Power performed certain acts in its own interests. Its obligations were more in favour of the

1. W. W. Buckland, *Reflections on Jurisprudence*, p. 107,

2. Jethro Brown, *The Austinian Theory of Law*, p. 194.

3. Buckland, *op. cit.* p. 109; ..

Princes than of the people. It never regarded the improvement of the administration of the States, much less their constitutional reform, as one of its obligations. That its so-called obligations were what might be described as 'self-regarding duties', is obvious from the motives which underlay its assumption of responsibilities towards the Indian States system. In the 'early days' of Paramountcy, with reference to the policy of the French Power in India, Sir George Barlow wrote : "It has for its object the subversion of the British Empire in India.....It is absolutely necessary for the defeat of these designs that no native state should be left to exist in India which is not upheld by the British power or the political conduct of which is not under its absolute control."¹ Karl Marx remarked in 1853 thus : "It is not the native States, but the native Princes about whom the question resolves. The Princes are the stronghold of the present abominable English system."² The nature of an obligation is conditioned and determined by extra-legal factors. However its legal validity cannot be impugned on that account. As the Paramount Power acknowledged certain obligations as binding, and as the relationship contemplated by Paramountcy was one of superiority and subordination, we may regard such obligations as non-imperative duties. The Crown *suo moto* fulfilled them and their scope could not be prescribed by the Princes. "The re-assertion (by Lord Reading) of the full extent of the Paramountcy of the Crown with the assent of the King," says Keith "laid down that the final judge of the ambit of Paramountcy must be the Crown itself "³ Long ago Lee-Warner wrote that " The position of the British Government is not. *primus inter pares*, but paramount, and has never lacked force to maintain its rights and compel obedience." ⁴

The foremost obligation of the Crown was the protection it gave to the Princes. This protection weakened them. They ceased to be self-reliant. As remarked by a writer, " the rulers were losing their

1. Tupper, *op. cit.* 33;

2. Palme Dutt, *India Today*, p. 357.

3. Keith, *The King and the Imperial Crown*, p. 421;

4. Lee-Warner, p. 206.

initiative and sense of responsibility.....The British Government weakened the efficacy of checks,"¹ which could have proved wholesome. The Rulers were indirectly encouraged to become despotic so that the Crown could thereby exercise a firmer hold on them. "In untrammelled Eastern countries, the remedy against unbearable despotism is mutiny, rebellion, or palace intrigue and murder. Against these fates, the strong hand of the British guarantees the incumbents of the Princes' throne,"² observes MacMunn. This right to be protected could not be availed of by a Prince who tried either to foment trouble in the neighbouring territories or to suppress the just demands of his subjects. All States were entitled to protection whether they were protected, 'guaranteed', or 'vassal'.

Protection was not limited to rendering military assistance merely. The Princes first contended that "the sole object of their alliance was military protection."³ But they sought the help of the Paramount Power in other spheres also. While protesting against intervention when contrary to treaty stipulations, they began to press for extensive protection, unwarranted by the treaties, in the name of security of their States. Sen speaks in general terms of the Princes' "right to demand the assistance of the Crown against external danger".⁴ This right was recognised by the Paramount Power in many cases. The British Indian Press was gagged by the 'Indian States' Protection Against Disaffection Act, 1922', which was described as a measure "essential for the interests of British India."⁵ But the British Indian Legislature rejected it. The Bill was certified by Lord Reading, who, "securing for it the assent of His Majesty,..... achieved the double purpose of humouring the Princes and shackling the publicists."⁶ The

1. Sydney Low, *The Indian States and Ruling Princes*, 22;

2. MacMunn, *op. cit.* p. 361.

3. Barton, *The Princes of India*, ch. xii ;

4. Sen, *op cit.* 163 ;

5. India Act, 1919, Sn. 67 b. ;

6. Gundappa. *Indian States*, p. 57 ;

Princes were protected from local criticism by a Notification of the Government of India of June 25th, 1891 : " No newspaper or other printed work.....containing news or comments.....shall, without the written permission for the time being in force of the Political Agent, be edited."¹ The Act of 1922 protected the Princes from without. They said that " as the Government have undertaken the duty of protecting them from foreign aggression or invasion.....they are equally responsible for their (Princes') protection from the insidious attacks of the Indian Princes sedulously directed against them and positively baneful to their prestige and honour."² This was the burden of their argument.

Lord Curzon was of opinion that public criticism would do the Princes a lot of much desired good. He did not consider that the obligation of protection covered protection from criticism. " When wrong things go on British India," said Curzon, " the light of public criticism beats fiercely on the offending person or spot. Native States have no right to claim any immunity from the same process."³ There was no justification for the Princes' claim for special protection when the penal law provided ample safeguards against defamation and sedition. In support of the Bill just mentioned, Sir Harry Haig, Home Member, said : " The Bill says that the administration of the States is to be protected, and they are entitled to be protected against subversive attacks from beyond their own borders. This is not only an obligation which we owe them, but an obligation we owe to the peace of India as a whole—the peace of British India as well as of the States."⁴ This was too elastic an interpretation of ' obligation ' as originally understood, in the context of ' protection.'

There were limits to the obligation of protection. " The extent of the obligation of protection against internal danger depends on the terms of the guarantee given by the Crown.....

1. R. Palme Dutt, *India Today*, p. 361.
2. Abhyankar, *Problems of Indian States*, p. 21;
3. Rajkot Speech ;
4. Raghubir Singh, *Indian States and the New Regime*, p. 161.

The guarantee does not afford an Indian State the right to demand the assistance of the British Government in case where the danger menacing its existence or maintenance of its power and possession has been the result of any incapacity or flagrant misrule on the part of its Ruler." ¹ The pledges of the Crown "to protect the dynastic rights of the Princes must needs read differently now from the way they read a century or more ago No undertaking can be rightly interpreted without weighing the effect of the lapse of time and change of circumstance." ² This was based on the *maxim rebus sic stantibus*. A strict interpretation of the duty of protection was now and then made a justification for denying assistance to Princes. In Bahawalpur, a domestic squabble portended, not only palace disturbances, but also graver consequences. It began like a tornado. It was in 1850 when the Nawab sought British help to supersede his eldest son, "the Governor-General decided that, according to treaties with Bahawalpur, the British Government was bound to support the Chief against external enemies, but was not bound to aid him against intestine commotions." ³

In some cases protection was granted to the subjects when oppressed by their rulers. "We extend protection to the subjects of native States" says Tupper, "first as against gross misrule, secondly as against all enemies of the British Government by our general measures for the defence, and thirdly in our ordinary relations with foreign powers, because we give the subjects of Indian States in foreign countries the same protection that we give to native Indian subjects of His Majesty." ⁴ Protection of the Princes was given to the Governor-General as one of his special responsibilities. Instruments of Instructions to the Governors directed them to "construe.....the protection of the rights of any Indian State" ⁵ as their special responsibility. Treaties and Proclamations, Statutes

1. Sen, *The Indian States*, p. 168;

2. Coupland, *The Future of India*, p. 147.

3. Aitchison, Vol. viii, p. 398;

4. Tupper, *our Indian Protectorate* p. 354.

5. *Instrument of Instructions*, Govt. of Ind. Act, '35.

and Government Resolutions, speak of the Crown's supreme interest in protecting the Princes. But protection was not extended as a matter of course. The right to be protected "must be construed as subject to the Paramountcy of the Crown, acquired by usage independently of treaties."¹ Merely because a State possessed a treaty or other document promising protection, it could not claim it. The Crown, in its Paramountcy, would either grant it or withhold it.

The obligations of the Princes were many and onerous. They owed a number of positive duties; they suffered a host of disabilities, and they were subject to several liabilities. It is said: "The feudatory States or their Rulers can be and are punished when occasion requires, by fine, by the deprivation of salutes and other honours, by sequestration for a time, by the diminution of judicial authority and in extreme cases, by the deposition of the Ruler or even the incorporation of the State..... The Rulers are legally liable for an offence to a penalty imposed by a political superior."² This passage shows the extent of obligations of the Princes. Again, "No Native State can have any political communication with any other Native State, nor maintain more troops or military establishment than are required for purposes of internal administration, for the support of the reasonable dignity of the Chief or except in accordance with its recognised obligations towards the British Government..... There is no Native Chief who might not be tried and punished for a crime of a special atrocity by a tribunal constituted by the British Government."³ The Maharaja of Gwalior was reprimanded for his military efficiency; "the source of conflict with the British power in his case was not his weakness as sovereign over the State of Gwalior but his strength..... From 1781..... until Gwalior was taken in 1858 and the Maharaja reinstated in power, the history of British relations was one of constant military interference and chastisement of the Darbar's troops"⁴ which had

1. Eddy and Lawton, *India's New Constitution*, p. 20;

2. Tupper, *op. cit.* p. 5;

3. Strachey, *India, Its Administration and Progress*, p. 306;

4. Lee-Warner, *op. cit.* 24;

grown dangerously powerful. The trial of delinquent Rulers by a special tribunal was a political proceeding. "In the case of Indian Princes, there is no judicial trial at all. However the offences committed by them do not as a rule go unpunished... The action of the British Government in bringing them to justice is an Act of State." It was established that the jurisdiction of the Paramount Power to enquire into and punish the misconduct of the feudatories was recognised and admitted by the Chiefs themselves."¹ The normal judicial procedure was not adopted. Where a Ruler was deposed for "complicity in the death of his uncle and interned out of his State"² and he appealed to the Privy Council against the findings of the Commission, it was held that the conviction of the Ruler was by a tribunal appointed by the Government "in its political and sovereign character..... and was not, in any sense a court"³ from which any appeal would lie.

The Princes owed obligations to the Crown both in times of war and peace. In the treaties negotiated by Lord Hastings, the duty of the Princes "to furnish troops according to their means at the requisition of the British Government," is invariably specified. The Princes were obliged to place all their resources at the command of the Crown, to give a blank cheque as it were, when emergencies arose. They could not possess more troops, arms, or ammunition or any other military equipment, than what was prescribed or permitted by the treaties. There were limitations both on the strength as well as the character and composition of the States' forces. Severe restrictions existed regarding recruitment to the armies; these were aimed at the prevention of foreign mercenaries, malcontents, adventurers, soldiers of fortune, 'swash-bucklers and freebooters'⁵ swelling the ranks. Provision of rights of cantonment, supply of food, placing transport and housing facilities at the disposal of the Crown

1. Ranbir Singh, *Legal Problems in Indian States*, p. 54.
2. Thornton, *Life of Meade*, p. 205;
3. Aitch., Vol. v, p.112;
4. *Madhav Singh (Panna) Vs. Secretary of State*, I. A. 31 (1904) p. 239;
5. Lee-Warner, *op. cit.* 231.

and rendering such other assistance as might be demanded, were tasks the performance of which was deemed obligatory. Even as the Crown's Paramountcy implied extra-treaty rights, the Princes' subordination involved extra-treaty obligations.

"The Princes owe allegiance to the King and their position in that assentual resembles that of subjects."¹ Allegiance is "not an expression of mere courtesy or friendly sentiment. It is a solemn undertaking to serve and obey."² It is neither wholly personal nor impersonal. It is a duty towards the Crown "which combines the personal character of the monarch as symbolised and represented by the King, with its corporate character as a political institution, which goes on independently of the personal fortunes of the monarch."³ It is said that "The duty of allegiance is applicable to the Sovereign as well in his natural as in his regal or political capacity."⁵ The Princes repeatedly professed and proclaimed their loyalty to the Crown; but their loyalties were many; "Four loyalties strive for the mastery of his (an Indian Prince's) soul. First, his loyalty to the Crown.....It is a personal sentiment with a religious bias; second, loyalty to India;... third, to his throne, his State, and people;.....fourth, to his order."⁶ The Crown had its priority. It was not so much a conviction of the Princes that there was any sacredness about allegiance as it was their realisation that it was a condition precedent to their existence. Recently their spokesman said: "Their loyalty to the British connection is fundamental to their policy, for they realise that their autonomy and freedom to develop according to their traditions depend on the protection of the Paramount Power."⁶ The following opinion shows the motive of allegiance, how far it was 'a personal sentiment with a religious bias.' Sir Henry Cotton remarks thus: "It was a self-preserving instinct rather than any sentiment of loyalty or homage

1. *The King and the Imperial Crown*, p. 421;
2. Gundappa, *The States etc.* p. 23
3. Jenks, *Book of English Law*, 153;
4. *Hal.* vi 415
5. Cumming, Sir John, *Political India*. p. 267.
6. Panikkar, *The New Empire*, p. 124;

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6. Panikkar, *The New Empire*, p. 124;

which placed soldiers at the disposal of the Paramount Power.....The Princes are not primarily animated by spontaneous and unselfish motives."¹ This is harsh, but true. It was Lord Canning who repeatedly insisted on the Princes' allegiance to the Crown. His adoption *sanads* contained this conditional assurance: "Be assured that nothing shall disturb the engagement made to you so long as your house is loyal to the Crown." On the strength of this allegiance claimed from them, the Princes developed a fatuous fiction of a personal relationship with the Crown. It is as heads of States that they owed allegiance to the Crown, the head of the superior State. Mere personal loyalty creates only personal rights and obligations; it cannot affect constitutional relations.

Was it an obligation on the part of the Princes to the Paramount Power to refuse to introduce constitutional reforms in the States when legitimately demanded by their subjects? The Princes were liable to intervention of the Paramount Power in case of their administrative machinery proving inefficient; but there was no duty cast on the latter to direct the Princes about necessary constitutional changes. On the other hand they were suffered to rule arbitrarily. Paramountcy was not a stumbling block in the path of responsible government. The Princes used their Paramountcy obligations as pretexts for denying responsible government to their people. But were the States denied a right, to set their own houses in order, to escape intervention, partially at least? In the words of Tupper, "this interference could be effectively restricted if only the Indian Rulers maintain good government. Chiefs who govern well need not have any fear of interference."² But 'good administration' is not 'responsible government,' nor is the latter the antithesis of the former. As suggested by Lathe, "The only way to escape from the tightening effects of an unending tutelage is for the States to pursue a path of constitutional reform wherein a power will be brought into existence within the State itself to check the natural faults of autocracy..... This internal power of self-improvement

1. Cotton : *New India*, p. 25. .

2. Tupper, *Our Indian Protectorate*, p. 307.

has none of the evil tendencies of external force trying to check the excessive growth of the evils of autocracy.If intervention is a palliative in acute stages of illness, an internal constitutional reform would mean the growth and stimulation of vital forces within the body."¹

It is true certain treaties prohibited constitutional reform without previous permission. In the Mysore Instrument of 1881 article 23 reads: "No material changes shall be introduced without the consent of the Governor-General in Council."² Perhaps this restriction was inserted to protect the people from reactionary changes, or to ensure that the system which was well organised would not be tampered with lightly. This could not be treated as an absolute bar, which practically all the Princes pleaded, when responsible government was demanded by their subjects. The Princes wanted the States to be considered separately but where it suited them, they were prepared to be considered *en bloc*. They conveniently put forth a 'bar' to constitutional reforms in the State, which never existed in any of *their* treaties. In their dealings, more often than not, they have successfully approbated and reprobated. They could as well have told their people that they were not inclined to grant their requests, instead of excusing themselves on the usual but untenable ground of Paramountcy obligations. They refused to realise that "the establishment of responsible Government in the States was the only way of restricting Paramountcy to its proper field of action."³

A few statements of responsible persons may prove instructive. In February 1938 Lord Winterton stated in Parliament that "it was not the policy of the Paramount Power to intervene.In particular, it would certainly not obstruct proposals for constitutional advance initiated by the Ruler. The consent of the Paramount Power had not been required before approval of such advance by the various Princes."⁴ Colonel Muirhead made this statement

1. Latthe, *op. cit.* p. 133 ;

2. Aitch. ix ;

3. Sastry, *Indian States and Responsible Government*, p. 9;

4. *Report on Constitutional Reforms*, para 100 (Mysore).

in 1938 : "The Paramount Power does not obstruct proposals for constitutional advance initiated by Rulers, but His Majesty's Government have no intention of bringing any form of pressure to bear upon them to initiate constitutional changes."¹ Lord Zetland amplified Earl Winterton's statement. They speak of 'constitutional advance initiated by the Ruler' and the Rulers always alluded to obligations to the Paramount Power as not likely to be discharged by a responsible government. But a Ruler need not have divested himself of such powers as were required for discharging his obligations to the Crown, if he had no confidence in a popular government's capacity to do so. Though "Legally it was not possible for the Ruler to divest himself of his undivided authority and jurisdiction over the governance of his State in favour of any other authority, without the active concurrence of the British Government",² it does not follow that the Ruler could neither take the initiative, nor allow his subjects to do so, for bringing about constitutional reform. Treaty restrictions were not insurmountable obstacles; for "No compact can endure when.....it has ceased to square with general conceptions.....Things no longer stand in India as they stood when most of the treaties were made."³

One particular obligation which has been acknowledged and discharged by the Crown to the immense joy of the Princes is its non-assignment of Paramountcy to any government without the consent of the Princes. This will be discussed at a later stage.

1. *Mysore Constitutional Reforms Report*, 1939, para.101;

2. Per C. P. Ramaswamy Aiyer, Sastry, *Indian States*, p. 122;

3. Coupland, *The Future of India*, P. 147.

CHAPTER XVI

Sovereignty under Paramountcy.

The Indian States are unique specimens of political communities. "They are *sui generis*, and there is no parallel to their position in history" ¹ Their relationship with the Paramount Power is unprecedented. "The nearest historical parallel", 'perhaps', as the writer cautiously says, "to this peculiar relationship was that between Rome and its client kings; and many a British resident at a native court might have felt himself at home in the kingdoms of Herod and Ptolemy." ² It is their vast number, their bewildering variety, and the disparate nature of the rights possessed by them which make any generalisation impossible. But treating them individually would mean exploring the history of each—a task not worthwhile. Taking the States collectively, their constitutional position may be studied. Whatever differences may obtain amongst themselves, they were treated as of one class *vis a vis* the Crown. Lord Reading took occasion to clarify the position to the Nizam in these words: "The title 'Faithful Ally' which your Exalted Highness enjoys, has not the effect of putting your government in a category separate from those of other States under the Paramountcy of the Crown." ³ The Princes' counsel conceded that "Paramountcy bears the same meaning in relation to all the States, although the precise manner in which it is put into operation in any given circumstances may differ." ⁴ If Paramountcy meant a common authority over all the States, their sovereignty, apart from differences *inter se*, was necessarily the same, *vis a vis* the Paramount Power.

An Indian State is defined as "a political community, occupying a territory in India of defined boundaries, and subject to a common

1. Report of the Indian States Committee, para 43;

2. Schuster and Wint, *India and Democracy*, p. 127.

3. Lord Reading's *Letter to the Nizam*, 27-3-1926.

4. Counsel's Opinion, para 4;

and responsible ruler, who has, as a matter of fact, enjoyed and exercised, *with the sanction of the British Government, any of the functions and attributes of internal sovereignty.*"¹ In early enactments they are described as "the country powers or States," "the country Princes or States," and "the native Princes or States of India".² Again, "An Indian State is a part of India recognised as under the direct rule of its own Prince or Chief, in treaty relation with the British Crown, enjoying the rights and privileges embodied in the instrument regulating its existence."³ This definition refers only to 'treaty relation' and not to political practice and usage. In none of these definitions are the States spoken of as sovereign. In the latest statutory definition also it is so. It says: "An Indian State includes any territory, whether state, estate, jagir or otherwise"⁴ etc. It does not define an 'Indian State.' It does not say what an Indian State *means* before saying what it *includes*.

A State, according to a modern definition, "is an independent political society occupying a defined territory or territories the members of which are united together for the purpose of resisting external force and the preservation of internal order."⁵ The Indian States have neither independence nor the right of defence against external force. The essential quality of a State is not so much independence as it is sovereignty. For "usually the government of a 'state' is understood to be independent of external control; but we also apply the term to governed societies that lack this characteristic, being members of a federal union, or dependencies of a dominant state."⁶ The Indian States belong to the last class.

Protection and independence cannot go together. But no modern State is absolutely independent. Isolated independence is-

1. Lee-Warner, *op. cit.* p. 30;
2. Act of 1793, 33 Geo. 3, ch. 52, Sections 40, 42, & 20;
3. Reed and Cadell, *India*, p. 44.
4. Government of India Act, 1935, sec. 311;
5. Chalmers and Hood Phillips, *Constitutional Law*, p. 1.
6. Sidgwick, *Development of European Polity*, p. 27.

both legally and politically impossible. But the inter-dependence of the international political communities is not the same thing as the complete dependence of the Indian States. Panikkar cites with immense satisfaction the views of two Continental professors that the Indian States possessed an international status and that their dependence was not derogatory to such a position. The German doctors, namely Dr. Viktor Bruns of the University of Berlin, and Dr. Carl Bilfinger of the University of Halle, seem to have been specially invited by the Princes to canvass their case. It was through the courtesy of Sir Mirza Ismail that their views could be obtained by certain writers. On the ground that the Crown respected the pre-Paramountcy treaties of the Indian Princes with foreign Powers, and that the ratification by the States of certain measures of an international nature, like the draft convention concerning workmen's compensation, was a condition precedent to their applicability to the States, Panikkar argues that the States are international persons. He cites the opinion of the German experts: "the Paramount Power of the British Crown is not incompatible with the independent status of the Indian States as international persons..... States which are under the Paramountcy of another State remain independent international persons, so long as they are not incorporated in the other State."¹ What a test of 'independent international status'! If a State is incorporated in any other State it ceases to be a State. Does the fact that it is in possession of its territory suffice to confer on it an international status? If this criterion is applied there would be no difference at all between a dependent and an independent State. It is surprising that an international status should have been claimed on behalf of States which had no voice in any external affairs. As Westlake would put it, "a State..... is non-existent if no foreign relations are allowed to it." and the Indian States, for purposes of International Law, are thus 'non-existent'. Further their dependence for protection on Paramountcy *ipso facto* deprived them of all independence.

1. Panikkar, *Intèrstatat Law*, p. 30;

The Indian States lack sovereignty in its full measure. A State may be dependent; it does not follow that it has no claims to some sovereignty. Time was when sovereignty connoted the highest political power—what Grotius would call *Summa Potestas Civitas*. It has latterly fallen from that “bad eminence”. Austin regarded sovereignty as indivisible. Either a ruler was sovereign or not; there could be no compromise. But Austin’s concept could not prove of any use with reference to the federal forms of government which became popular early in the twentieth century. Modern sovereignty is subject to both external and internal limitations. Austin’s sovereign was just a legal sovereign. It is not possible to reconcile the legal with the actual sovereign. There is something ‘unreal’ about the legal sovereign. “The person or body which can enact what it will and is under no superior in this matter”,¹ is, to Austin, a sovereign. “The general rules which the sovereign lays down are the law..... The law is law since it is made by the Sovereign. The Sovereign is Sovereign because he makes the law. But this is not circular reasoning; it is not reasoning at all.”² says Buckland. Austin’s command theory also has lost its popularity owing to its inelasticity. But one must bear in mind the change in outlook about law and politics. “The constitutional theory of the past has been based upon a simple conception of the State. Austin’s idea of a Sovereign and a subject was no more than a description of the British Empire at the time he wrote. But to-day we cannot find a Sovereign in the Austinian sense.....When theory and fact differ, it is a good rule to scrap your theory.”³

Keith rightly remarks that “Sovereignty as a political term has of late fallen into disrepute.”³ Naturally as its tendency is to divert one’s international sympathies towards the cult of the nation-State, it has not commended itself to liberal thinkers. There was an apotheosis, as it were, of national sovereignty, and this manifested itself in the modern totalitarian State. No modern State can be all in all. The

1. Buckland, *op. cit.*, p. 43 :

2. Goodhart, *Essays in Jurisprudence*, p. 33;

3. Keith, *The Sovereignty of the British Dominions*; p. 5

concept of an absolute and independent State". says Laski, is incompatible with the interests of humanity."¹ Elsewhere he suggests: "We have.....to find the true meaning of sovereignty, not in the coercive power possessed by its instrument, but in the fused goodwill for which it stands."² But lawyers have little to do with this aspect of sovereignty. According to Fischer Williams, in international law, "Sovereignty as a legal principle has no positive significance. It is a limiting factor—limitative, not declaratory, of law; what is sovereignty is not law; what is law is not sovereignty. All law is based on an abandonment of sovereignty."³ This is too heterodox a view, although it shows how old theories are getting scrapped. After all the theory of sovereignty has to be in consonance with the progress of society. "In jurisprudence sovereignty is supremacy recognised by law."⁴ says Jethro Brown. This is acceptable and not Fischer William's radical doctrine of sovereignty being the antithesis of law.

In Sir Henry Maine's celebrated Minute on Kathiwar States the sovereignty of the Indian States is recognised. He says: "Sovereignty is a term which, in international law, indicates a well-ascertained assemblage of separate powers or privileges. But there is nothing in international law to prevent some of the rights being lodged with one possessor, and some with another. Sovereignty has always been regarded as divisible.....but independence is not."⁵ The Indian States have no external sovereignty. They possess limited internal sovereignty. It is owing to this perhaps that sovereignty is practically denied to them. Lawrence holds that the Indian Princes are not even quasi-sovereign.⁶ Certain Indian States at least have "large powers of internal sovereignty".⁷ Large powers do not make full powers. What about the large number of small States? "The more

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1. Laski, *Grammar of Politics*, 64, 64;
 2. Laski, *Foundations of Sovereignty*, p. 12 ;
 3. *Aspects of International Law* ; p. 25 ;
 4. Jethro Brown, *The Austinian Theory of Law*, 277.
 5. Butler Committee Report, para 44;
 6. *International Law*, p. 62;
 7. But. Com, Rep., para 16;

important States enjoy within their own territories all the attributes of sovereignty. The sovereignty of others is of a more restricted, kind and over others again the Paramount Power exercises in various degrees an administrative control."¹

Many attempts at classification of the States have been made. What is material is a distinction based on the measure of internal sovereignty possessed by the diverse States. The Indian States Committee speak of three classes; first, the States, the rulers of which are members of the Chamber of Princes in their own right; secondly, States, the rulers of which are represented in the Chamber by twelve members elected by themselves; and thirdly, Estates, Jagirs and others. The rulers of the first two have "in greater or less degree, political power, legislative, executive and judicial, over their subjects."² But these 'powers' are only portions of sovereignty. "These States vary extremely in origin and political power but all alike possess certain attributes of sovereignty, and all alike are under the Suzerainty of the Crown."³ There can be no compromise between possession of full sovereignty and being under Paramountcy. Sovereignty under Paramountcy must perforce be of a limited character. Even Rulers of States who had direct dealings with the Government of India and not through Agents to Provincial Governors, could not, on that ground, claim a status higher than that of the others. The Salute List also does not satisfactorily indicate the measure of sovereignty possessed by the States. Lord Chelmsford once observed that the Salute test, "however arbitrary and meaningless, was the only possible basis of distinction."⁴ But that was not the test adopted by the Indian States Committee; but indirectly it was so, as the membership to the Chamber of Princes was fixed on that basis. The old distinctions between treaty and non-treaty or *sanad* States, or between a tributary and non-tribute-paying State, have lost value. It has often happened that the

1. Joint Parliamentary Committee Report, Vol. i, part i, p. 2.

2. Butler Committee Report, para, 11;

3. Halsbury, *Laws of England*, x, 585.

4. Bose, *The Working Constitution of India*, p. 17.

classification and gradation have created anomalies in the Rank and Precedence List. Moghe complains that "The Hon'ble Mountstuart Elphinstone states that Mudhol and Ramdurg are of equal status. While Mudhol has to pay a tribute for service, Ramdurg, not being a service Jagir, has to pay no such tribute and ought to be considered even superior to Mudhol."¹ Mudhol was a Salute State; Ramdurg was not. There may be a good number of such instances.

Sen classifies the States as (1) Protected, (2) Protected and Guaranteed, and (3) Vassal. This is based on an analysis of their treaty relations, as he says.² But all the States are Protected ones. When Victoria assured the Princes that she would respect their position, and King Edward the Seventh proclaimed that their treaties would remain 'inviolable and inviolable', we may say that every State secured a 'guarantee'. It is said that "A distinction is usually drawn between a treaty of guarantee, which guarantees the existence and independence of the weaker State, and a protectorate which implies a closer relation."³ All Indian States which are 'guaranteed', are protected ones; but the converse is not true. The States, big or small, belong to Sen's third category. That the term vassal or feudatory indicates want of full sovereign power is not quite accurate. A vassal State can possess sovereign powers. Mysore cannot be relegated to a position constitutionally inferior to that of a State like Orchha, just because the latter possessed a 'guarantee treaty', whereas the former, according to Sen, had only an 'instrument of vassalage'.

In view of the fact that independence has ceased to be an absolute concept and sovereignty has been recognised as divisible, the Indian States can be said to be semi-sovereign States. "The Indian States, may in theory, be sovereign States (not in the full sense); but they are not independent, being subject to the ultimate jurisdiction of the Crown."⁴ At first some were sovereign; but none

1. K. B. Moghe, *The Indian States* pp. 151-152.

2. Sen, *op.cit.* p. 16;

3. Nathan, *Empire Government*, p. 136;

4. B. P. Singh Roy, *Parliamentary Government in India*, p. 157;

independent. The Privy Council held that the old Tanjore State was a sovereign State.¹ The sovereignty of a small State like Fardikot was judicially recognised. It was held that the State belonged to a class which could be regarded as "separate political societies and as possessed of an independent civil, criminal and fiscal jurisdiction."² A very important decision from the point of view of the status of Indian States is one given by the Madras High Court recently. In delivering judgment of the Court, Sir D'Arcy Reilly laid down the following tests : (1) The people of the territory must own allegiance to the ruler ; (2) The laws enforced in the State must be the ruler's laws, either made or recognised by him ; and (3) those laws must be enforced by his courts, that is, courts deriving their authority from him and not subject to the judicial control of any outside authority."³ Where laws are imposed by an external authority, there is no sovereignty. Possession of plenary powers in the fields of legislation, judicial administration, and executive government, qualifies a State to the title of sovereign, albeit subject to intervention inseparable from the Paramountcy of the Paramount Power. Even as Bryce puts it, "Sovereign authority means the person or body to whose directions the law attributes legal force, the person in whom resides as of right, the ultimate power, either of laying down general rules or of issuing isolated rules or commands whose authority is that of law itself."⁴ The Fardikot decision recognises the Indian States as possessing "attributes of independent States as were compatible with their condition of protection and dependence."

But the fact that the States are recognised as having sovereign judicial powers does not mean that they have all the characteristics of sovereignty. External sovereignty is indispensable for independence. "Thus two Indian States may be absolutely independent

1. *Secretary of State Vs Kamacheebai*, 7 M. I. A.

2. *Gurdayal Singh Vs. Raja of Fardikot*, (1894), 23 A. C. 670. 476;

3. *Kothavenkatarama Reddy Vs Bhupátrao* (Gadwal) etc.; 53, M. 968 ;

4. Bryce, *Studies in History, and Jurisprudence*, ii, 505.

of each other; but the same cannot be said of an Indian State *vis à vis* British India."¹ However the paramountcy of the Crown, though repugnant to their independence, was not so to their internal sovereignty. This was of course subject to limitation by intervention, treaty, capitulation etc. Curzon spoke of the 'Sovereignty of the Crown' over the Indian States. Reading declared that the 'Sovereignty to the British Crown was supreme in India.' It looks as though they advisedly used 'sovereignty'. If this view is accepted, the Crown would be Sovereign in respect of the States and not merely Paramount; and the sovereignty of the States, now highly circumscribed, would be non-existent. For how can there be a sovereign under another sovereign? In spite of the fact the States' "internal sovereignty was being whittled down before the inexorable claims of Paramountcy which subtly refused to be in any way defined and whose immortality was proclaimed in a phrase that must act like a *bete noire* to Indian Princes",³ they still retain their internal sovereignty in the eye of law. As observed by Sir William Barton, "Most of the important States are in treaty relations with the British Crown,..... of the rest a large number, either by covenant or by convention, are assured their status as self-governing and internally independent entities."⁴ Independence means immunity from control, 'internal independence' means little more than the position of autonomy. Whenever one speaks of sovereignty, it should be in relation to any particular set of facts presented by the political society in question. Sovereignty has ceased to be a concept having an absolute meaning. "The use of the term 'sovereignty' with reference to an Indian Prince must be always understood to be modified by the almost all-embracing grip of Paramountcy from which nothing could really escape."⁵

1. *Baroda State Railway Vs. Habibulla*, 56 All. 828;

2. Raleigh, *Lord Curzon in India*, p. 227;

3. D. N. Naravane. *The Indian States in the Federation of India* 20.

4. Barton, *India's Fateful Hour*. p. 20;

5. Latthé, *op. cit.* 31.

The third class of States according to the Indian States Committee's classification, consists of "Estates, Jagirs, and others." They were three hundred and twenty seven in number. "The petty states of Kathiawar and Gujerat, numbering 286 of the total of 327..... are organised in groups called *thanas* under officers appointed by the local representatives of the Paramount Power, who exercise various kinds and degrees of criminal, revenue, and civil jurisdiction."¹ The Heir-Apparent of a mediatised State in Malwa,² tries to prove that the distinction between the larger and other States is artificial, invidious, and legally untenable. In his book on the subject,³ time out of number, he complains of what he considers unfairness to 'the so-called smaller States'. In fact without the preceding participle *so-called*, he never refers to the term *smaller States*. While the bigger Princes wanted their States to be considered separately to avoid their being mixed up with the smaller fry, the rank and file prefer to be treated collectively. The test of a State's status is not so much its size as it is its political stature. It is on the basis of powers possessed by them that any denomination may be regarded as proper or not. The 'so-called smaller States' of Raghbir Singh, including his own Sitamau, are smaller States properly so called. It is the want of certain powers that characterises them as smaller States. They have practically disappeared now. These were States by courtesy. Some of these petty principalities were under a condominium—a joint control exercised by the Political Agent and some other Ruler.

All the non-jurisdictional or semi-jurisdictional States cannot be called, feudatories. In Kathiawar there were 'Estate's', 'Mulgirassias', 'Jagirs' and so on. The petty States in the Central Provinces, particularly those belonging to the Chhattisgarh group, were feudatory States properly so called. When Nagpur was annexed in 1853, its tributary Chiefs and zamindars were allowed to retain their possessions and accept British suzerainty. They had to

1. Butler Committee Report, para 17.

2. Aitchison, IV, 387.

3. *Indian Princes and the New Regime*, Raghbir Singh :

execute fealty-bonds in these words :— " I am a Chieftain under the administration of the Chief Commissioner of Central Provinces. I have now been recognised by the British Government as Feudatory subject to the Political control of the Chief Commissioner or of such officer as he may direct me to subordinate myself to " etc.¹ The ' Mahals ' of Orissa belong to the same type. Many of them were the vassals of some bigger States. Some of them have not been completely severed from their former contact. " The great conquerors such as Sindhia brought under their control many other Chiefs, Rulers and Thakores In most cases the British Government had no desire to upset the Maharatta Chiefs unduly by interfering with the status of such Chiefs The British left Sindhia with his satellites Those in Baroda were mostly brought under British control in return for the payment of tribute to the Gaikwad by the Government."² Sen divides Bihar and Orisa States into Vassal, Tributary, and Sovereign.³ Even the ' Sovereign ' State of Mayurbhanj, was deprived of full autonomy. The Simla Hill States are a class apart. They are States only in name. For example " Clause 2 of the *Ikrarnama* entered into by the Raja of Nalagarh recognises the right of subjects of the state to appeal to the local British Agent against oppression and injustice and under Article 3, the Raja engaged himself ' on pain of forfeiture of grant to pay implicit obedience to any advice which the British Agent may have occasion to offer. " ⁴ Where in such non-jurisdictional States, the Political Agent fulfilled judicial function, it was political and not judicial. The Privy Council held that ultimate appeal lay to the Secretary of State for India. " The territory of the State not being British territory and no territorial sovereignty being claimed, the system of judicial administration is established not by legislation, but by orders of the executive government, the judicial officer being the Assistant Political Agent. They are under the Political Agents

1. Aitchison, *op. cit.* Vol. 1. p. 445;

2. Macmunn, *op. cit.* p. 100;

3. Sen, *op. cit.* p. 185.

4. Sastry, *Ind. States*, p. 43 ;

who are appellate authorities dealing with cases both political and civil. In the former cases their functions are diplomatic and controlling, deciding as they 'think proper.' In both the intention of the Government is and has been that the jurisdiction exercised should be guided by policy rather than by strict law."¹ This sums up the nature of sovereignty possessed by the States of this category. If the sovereignty of the States belonging to the first and second class was limited, it was, very much, more so in the case of these constituting the third class. Still the powers they possessed were a species of sovereignty under Paramountcy.

Owing to the increase in the cost of administration, and the growing complexity of work involved in controlling territories under diverse jurisdictions, a system of attaching petty States to larger ones was attempted by the Political Department. Kathiawar was the first area wherein the experiment was tried. It presented a political pandemonium. To evolve a system for co-ordinating the various agencies so as to bring about efficiency and effect economy. States constituting a natural or economic group were taken as units. Where they were contiguous and had common interests, they could be clubbed together with a large State serving as a nucleus. The Rulers were reluctant to get their States attached. But the scheme was put into effect. Its legal aspects were examined; the Princes felt that their rights were encroached upon. However, in 1944, Parliament passed the India (Attachment of States) Act which had retrospective operation. It legalised what had already been done. "By executive orders of His Excellency the Crown Representative, certain small States in Western India and Gujerat States Agencies were, without the consent of the Rulers, attached to certain larger States."² The Princes, as usual, complained that their treaty rights were violated. The Political Department issued a communique on the 2nd December 1944 to the following effect: "The interpretation of the text of the relevant treaties has long been affected by usage and sufferance and has in the nature of things to be related to the interests of the changing times." This was an invocation of:

1. (1906) A. C. 212, *Hemchand* etc.

2. *The Indian States and Paramountcy*, F. R. Dabhi, p. 2.

the *rebus sic stantibus* doctrine. "The two pressing needs, namely, remedying the administrative deficiencies of the small States, and facilitating their inclusion in any federal administration applicable to India as a whole,"¹ demanded attachment or consolidation of the petty States. In reply to the charge that "the step taken by him lowered the status and infringed the rights of many ancient families, the Crown Representative stated that autocratic powers should not be abused;.....nothing which is not inherently capable of survival should be artificially perpetuated;.....and the ultimate test of fitness for the survival of any State was the capacity to secure the welfare of its subjects."² The result of attachment was the assignment of certain functions which were directly exercised by the Crown Representative through his agents, to the Special Officers of the Attaching States. This tended to create "an intermediate suzerainty between the Attached States and the Paramount Power."³ It is said that the Act⁴ which "legalises it is of doubtful validity,"⁵ whether "those rights and obligations (of the Rulers safeguarded by the Government of India Act, 1935).....could be affected by the Paramount Power by Act of Paramount appears to be an arguable point."⁶ The Princes' "basic principle of direct relationship" was ignored. The incidents of attachment are legally of no consequence. Only in the matter of relations with the Paramount Power the Princes had to deal with one more intermediary.

There are a multitude of Jagirs under some States like Gwalior, Baroda and Kolhapur. In size, population, and income, some of them are bigger than many States. But their status is inferior. The Jagirdars are vassals of the Rulers and are thus under their suzerainty. They resemble feudal nobles; their territories are part of the suzerain State; their subjects owe direct allegiance to

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1. D. R. Gadgil, *The Federal Problem in India*, 53
 2. Dabhi, *Ibid* ;
 3. Gadgil, *Ibid*, p. 54 ;
 4. *Encyclopaedia of General Acts and Codes of India*, Sapru Vol. XIV, p. 16.
 5. *Ibid*.

the suzerain; and the latter can legislate for the feudatory areas. Some feudatories have been conferred the status of Rulers. Though the Crown could not directly create Indian States, it often followed the policy of recognising the feudatories as independent; for instance, such as those of Khilichpur, Rajgarh and Jaora, the mediatised Chiefs under Gwalior, long ago received recognition as Rulers of independent States.¹ The motive behind the policy was "the expediency of weakening the Mahratta Powers by having a belt of Rajput Chiefs and Girassias owing the security of their States and the comparative independence of their status to the intervention of the British Government."², according to an explanation of the Foreign Department in 1894.

All the States had some sovereignty which was not inconsistent with the Crown's Paramountcy; in fact Paramountcy had secured so much at least. To hold that "these Native Princes of the present day are the repositories of their ancient powers and dignity and nothing in the interim transpired to compromise their position" is to be wantonly impervious to the facts of history. Though not suddenly, at least during the long course of their association with the British, they lost sovereignty. With all that, the possession by them of some rights was all along respected; and so 'Sovereignty under Paramountcy' is not a paradoxical proposition. The Feudatory Jagirs have no claims to any sovereignty. They exercise delegated authority mostly.³ They may be said to have been under double suzerainty, immediate and mediate; the former of the Ruler of the State and the latter, of the Paramount Power. In special cases, without respecting their intermediate allegiance, the Paramount Power exercised direct control.

1. . Panikkar, *Interstate Law* P. 19.

2. *Ibid*, P. 91.

3. Deo, *The Princes of India*, p. V.

CHAPTER XVII

Exterritoriality and Extraterritoriality.

Exterritoriality is "the condition of being considered outside the territory of the State in which a person resides and therefore not amenable to its laws."¹ In international law certain persons are exempt from the jurisdiction of municipal courts. "These exceptions are grounded on the independence and dignity of the States.....In former times they were carried to an extravagant extent."² The principle was extended to foreign vessels as though they were floating portions of the territory of the State to which they belonged. To put it briefly, the exemption originally claimed was on the basis that a person carried the State with him, as it were. Oppenheim says that the concept of extraterritoriality is founded on a fiction; "the law of nations gives a right to every State to claim so-called extraterritoriality, and therefore exemption from local jurisdiction, chiefly for its head, its diplomatic envoys, the men of war" etc.³ "The privilege is not unlimited. The right of entrance into foreign territory on which the privilege is founded is one dependent on a comity which circumstances may abridge."⁴

The expressions 'Exterritoriality' and 'Extraterritoriality' are treated as synonymous. Dicey, Holland, Piggot, Stowell and others employ either term as an alternative for the other. Smith uses only the former with reference to the immunities enjoyed by Sovereigns, Ambassadors, ships etc. But some distinction between the two does exist. It is one of degree or emphasis. Both the words suggest that law, which is primarily and essentially territorial, contemplates some exceptions to its inherent territoriality. Exterritoriality is a privilege by virtue of which certain persons are saved from municipal

1. Wharton, *Law Lexicon* :

2. Westlake, *Private International Law*; p. 266;

3. Oppenheim, *International Law*, i, p. 230.

4. Deo, *The Princes of India*, p. 6. (from Woolsey, p. 101).

jurisdiction. Extraterritoriality may more appropriately be applied to the attribute which law possesses by virtue of which it applies to persons and places outside the normal territorial limits of the State. Exterritoriality as a personal privilege means exemption from jurisdiction; this results in limiting the jurisdiction of the *lex loci*. On the other hand the converse process is at work in regard to extraterritoriality; an extension of jurisdiction is involved. While extraterritoriality involves limitation of jurisdiction, the other means its projection beyond the realm. But both are complementary. If a person enjoys exterritoriality while in country 'X', he is subject to the extraterritoriality of the laws of the country 'Y' wherefrom he comes. Thus a European British subject, while residing in any Indian State, "is supposed to remain in the territory of his own sovereign. He continues subject to the laws of his own country which govern his personal status and rights of property."¹ That 'extraterritoriality' is more applicable to the operation of laws than to the exemption from it, can be seen from this passage: "The extraterritorial operation of laws; that is, their operation upon persons, rights or jural relations, existing beyond the limits of the enacting state, but still amenable to its laws..... The term is used to indicate jurisdiction exercised by a nation in other countries."² Extraterritoriality extends jurisdiction beyond the realm and exterritoriality, restricts it.

The distinction which we attempted to make between the two terms, however slight, is neither pedantic nor superficial. Latterly usage prefers 'extraterritoriality' which seems to have superseded 'exterritoriality' even where the latter could have been the proper word. "Exterritoriality is the privilege of those persons who..... enjoy exemptions from the operation of the ordinary law of the State."³ This meaning supports the distinction we made. With reference to 'extraterritoriality', Holland says: "Such expressions as seem to attribute an extraterritorial supremacy, *Herrschaft*,

1. Wheaton, *op. cit.* p. 225

2. Black, *Law Dict.*;

3. Black, *Ibid*;

to any system of law, are.....inconsistent with the absolute sovereignty of each State within its own territory." ¹ Here also 'extra-territoriality' is used with reference to 'any system of law' etc. Oppenheim is of opinion that if a person enjoys 'extraterritoriality,' nevertheless he is under the extra-territorial operation of the law of his country; he is subject or amenable to "self-jurisdiction." ² It may be added that extraterritoriality is a privilege recognised by international law; extra-territoriality applies to the extended operation of municipal law. But the distinction between the two becomes apparent only when the points of view taken are different. In any case they go together. Hereafter they are used as convertible, unless otherwise indicated.

The Indian Princes, like foreign Rulers, enjoy the privileges of extraterritoriality. The Gaikwad of Baroda was considered as not subject to the jurisdiction of English courts. "The Gaikwar of Baroda has been recognised by the Government of India as a ruling Chief governing his own territory under the suzerainty of His Majesty. But though His Highness is not independent, he exercises as ruler of his State various attributes of sovereignty which is not derived from British law, but is inherent in the ruling chief of Baroda." ³ "A foreign sovereign does not, by residing in British territory, waive his privilege or submit himself to the jurisdiction of the local courts. Nor does it make any difference that the wrongful act is done by the Sovereign in his private capacity." ⁴ The Gaikwad was sought to be brought within the jurisdiction of English law in respect of an act alleged to have been done in his private capacity, namely adultery. But Indian State subjects while abroad do not get the privileges of extraterritoriality extended to them. They are entitled to the privileges of British protected persons. Where the law of a State is incapable of extraterritorial application, it follows that the subjects of the State cannot claim

1. Holland, *Jurisprudence*, 421;

2. Oppenheim, *op. cit.* i, 627;

3. *Statham Vs Statham*, 1912, p. 92.

4. Salmond, *Law of Torts*, p. 52.

extritorial rights. Extraterritoriality follows extritoriality. The exemption granted to the Princes is based on other considerations rather than on any recognition of the extraterritoriality of the laws of their States. In fact they are unamenable to their own laws wherever they be; there is no 'self-jurisdiction,' as Oppenheim would say.

The extritorial privileges of European British subjects is based on the corresponding extraterritorial operation of British Indian laws. Normally the Rulers of Indian States have powers to legislate for all persons and places within their territories. On general principles the British Government exercises jurisdiction over all nationals; but this does not mean that they are not subject to the jurisdiction of the State wherein they reside. They cannot, as a matter of course, claim to be governed by their own laws when under another State. But the British Government projected its jurisdiction into the States. This was done under an authority whose source is twofold; the Foreign Jurisdiction Act and Paramountcy.¹

Law being normally territorial, "No sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions."² The same is the principle respecting legislative and executive jurisdiction. Where there are transgressions, they may be "binding on the municipal courts, but are internationally regarded as devoid of any effect."³ But how is the right of extritoriality acquired? According to Sir Francis Pigot, "The Queen's foreign jurisdiction in a governed country is not exercised by any inherent right of sovereignty which she herself possesses;..... it is exercised solely in virtue of the grant or permission to exercise it. The rights she exercises in oriental countries are merely the delegated rights of the actual sovereigns of those countries..... Such powers alone as are surrendered by the sovereign of the country can be exercised"⁴

1. Dabhi, *op. cit.* 9;

2. Per Story, Schmitthoff, *Conflict of Laws* p. 373;

3. Schmitthoff, *ibid*, p. 374;

4. Sir Francis Pigot, *Exterritoriality*, pp. 18-21.

But how this grant or permission or consent was superseded by another source of jurisdiction, is shown by Keith thus: "The extent of the Foreign jurisdiction of the Crown is by statute placed wholly within the control of the Crown" ¹ "The former system by which the Crown was accorded jurisdiction over British subjects and British protected persons in foreign countries by consent of the sovereign, has been in steady decline of recent years. It was under Victoria that it was made effective in operation by legislation." ²

The preamble to the Foreign Jurisdiction Act mentions that the sources of the extraterritorial jurisdiction of the British Crown are "treaties, capitulation, grant, usage, sufferance, and other lawful means." ³ Originally consent gave jurisdiction. It was implied in treaties, capitulations, and perhaps to some extent in usage also. Sufferance means acquiescence or assent and not consent. The phrase "other lawful means", means a large number of things, including political practice. The jurisdiction exercised by the Crown in a foreign country is not uniform. Where the Crown has secured the right of government "that right may be exercised as fully as if the territory belonged to a colony conquered by the Crown. In some places, for example the South African Protectorates, the territory is for practical purposes, a colony" ⁴ Parliament which cannot normally legislate extraterritorially, has conferred such a right on the Crown which can exercise such delegated authority by Orders in Council. Save in the Government of India Act of 1935, whereby federating States were amenable to Parliamentary legislation to a limited extent, Parliament could not make laws for States and State subjects. "But it has the power to do so and it has done so, for State subject outside the States, in the Foreign Jurisdiction Act, 1890; 'By section 15, of the Act wherein in future an Order in Council is made extending to persons enjoying His Majesty's protection; all subjects of the several Princes and States in India are to be included in that expression.'" ⁴ Although "the principle of State-sovereignty over air

1. *England from Victoria to George vi*, p. 127, Vol. ii;

2. *Ibid.*, p. 148. 3. 1890, 53 & 54. Vict.

3. Jennings and Young, *op. cit.*, Sec. 2;

4. Ridges, *op. cit.* p. 530;

has been recognised so far as air sovereignty of Indian States is concerned:.....subject to the necessary limitations of international requirements and the paramount needs of defence",¹ the carriage by Air Act of 1932, shows how "the legislative power of Parliament extends to all these territories including territories under His Majesty's protection."²

It was held by the Privy Council that the extra-territorial jurisdiction granted to the British by the Nizam could not be availed of for purposes of extending it either in respect of persons or things not covered by the cession. It was held that the notification issued by the Governor-General in Council was inoperative.³ The same tribunal held that "the King in Council has power to legislate himself by Order in Council or make provision by delegating such legislative authority to such a person or body of persons as he may decide."⁴ This case was one wherein the scope of the Foreign Jurisdiction Act was considered. In another case when the question was about the legality of the trial of a person not subject to jurisdiction, the Court was of opinion that acquiescence on the part of the person was enough to make him amenable to trial and that "there was no inherent want of jurisdiction" either. In 57 I. A. 318, it was also observed that "jurisdiction includes power". This was a liberal construction. The jurisdiction exercised is not strictly judicial; it is political and administrative.⁵

There are certain sources common to both Paramountcy and the Foreign Jurisdiction Act. Usage is a source of both. "Other lawful means" is wide enough to comprehend political practice. Again the Crown's prerogative may well come under the phrase 'other lawful means.' What are these other lawful means then? That the extra-territorial jurisdiction of the Crown rests on foundations other than consent is clear from Sir Robert Holland's statement: "There had been

1. Sastry, *Indian States*, p. 52;

2. Halsbury, xi, 129;

3. *Yusf-ud-Din Vs. The Queen Empress*, (1897), 24 I. A. 137;

4. *Dattatraya Kane Vs. The Secretary of State* 57, I. A. 318.

in the past a constant development of constitutional doctrine under the strain of new conditions..... The doctrine, as for instance in the case of extra-territorial jurisdiction such as railways and telegraph construction, had been superimposed upon the original relations of many States..... The Rulers' consent to such new doctrine was not always sought in the past."¹ This is the history of the case. What about its legality? Holland calls what was political practice, a 'constitutional doctrine,' when the legality of the exercise of some authority under the Foreign Jurisdiction Act was questioned, the British Government claimed that their right was based on Paramountcy. In a recent communication to Patiala respecting its jurisdiction over European British subjects, the Government of India have remarked 'this jurisdiction is based on the prerogative of the Paramount Power'.....But the ousting of State jurisdiction is a survival of the period of capitulations."²

There is again statutory provision for the exercise of extra-territorial jurisdiction. Section 294 (5) of the Government of India Act 1935, provides for the exercise of power under the Foreign Jurisdiction Act. "This section deals with a power which at present is exercised to prevent the trial by State courts of British subjects for offences committed in the States. The right is claimed and exercised under Paramountcy at present."³ This is a clear admission that neither consent nor the Foreign Jurisdiction Act were the sources of extra-territorial jurisdiction of the Crown as far as the Indian States were concerned. After all the Foreign Jurisdiction Act rests jurisdiction on 'treaty, usage etc.' It cannot by itself be a source of extra-territorial jurisdiction. Time was when the British sought and obtained jurisdiction. For example on the 10th July 1861,⁴ the Nizam granted jurisdiction to the Government of India in respect of certain persons: The *sanad* reads thus: "It is hereby made known by the Nizam's Government that in the event of any dissension or dispute arising

1. But. Rpt. para 35.

2. Panikkar, *Interstate Law*, p. 73;

3. *Parl. Debates*, Vol. 302, col. 1037;

4. Aitchison, Vol. ix.

among the classes aforementioned within the said territory.....the Resident shall be empowered to inquire into and punish any such offence etc." ¹ But this *sanad* was before 1890 when the Foreign Jurisdiction Act came into existence and the exercise of delegated authority by the Resident means that consent was the source of jurisdiction.

That the British Parliament provided for the intrusion of British jurisdiction into Indian States is evident from some statutes. In 1861 it was enacted thus : " The Indian Legislative Council is authorised to make laws for the servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty." ² Also the Indian Penal Code confers jurisdiction in respect of offences committed beyond the territories of British India. In 1833 the Governor-General in Council was empowered " to make laws and regulations for all persons, whether British or native, foreigners or others.....for all servants of the Company within the dominions of the Princes and States." ³ In the preamble to the Act of 1879 it is stated that "by treaty, capitulation, agreement, grant, usage, sufferance and other lawful means, the Governor-General in Council has power and jurisdiction within diverse places beyond the limits of British India." ⁴ "The Indian (Foreign Jurisdiction) Order in Council 1902, authorises the Governor-General in Council to exercise any authority of the Crown.....in parts of India outside British India The powers of the order are exercised in judicial and executive matters also Parliament secures the effective exercise of legislative authority to legislate for persons and places in the states and the final decision in law of such issues lies with the Crown itself." ⁵ It is true, in many treaties the Company promised that " the jurisdiction of the

1. Aitchison, Vol. ix.

2. 24 & 25 Vict. cap. lxxvii

3. 3 & 4 Wm iv, cap. lxxxv ;

4. 21, Vict. 1879 ;

5. Keith, *A Constitutional History of India*, p. 223 ;

British Government shall not in any manner be introduced."¹ But treaties, as we have seen, were not adhered to; political practice had superseded them considerably. Holland exalts political practice to the Status of a 'constitutional doctrine'.² It would not be incorrect to regard it as one of the 'other lawful means' for the acquisition of extra-territorial jurisdiction. Foreign jurisdiction has been exercised independently of treaties. That is why, in his foreword to Ranbir Singh's book, Sir Manubhai Mehta says: "The extraterritorial jurisdiction claimed by the British Government in Indian States is another feature of Paramountcy that still rankles in the side of the Indian States."³ As the Indian States Committee themselves concede, "Some of the treaties contain clauses providing that British jurisdiction shall not be introduced into the States;..... nevertheless the paramount Power has found it necessary" to do so.

The source of such an extension of jurisdiction is Paramountcy. Was it *ultra vires* the authority of the Paramount Power or was it within its rights? As the British Government had undertaken all foreign affairs, it had a right and duty cast upon it to provide for the protection of State subjects while abroad, as well as to ensure that alien subjects, while in the States, got the benefits of a rule of law. The British Government put forth these arguments in support of its claiming extra-territorial rights in the States, among other grounds which are more or less political. We need not go into the justice of the claim. Its legality is obvious. The States had accepted the protection of the British. Its incidents are evident. John D' Mayne says: "Parliament is as incapable of taking away the powers of a court in Travancore as it is of dealing with the courts of France."⁴; this is all right provided the Indian States had a place in international law. The very fact that they were protected States renders international rules inapplicable; and hence the need of Foreign Jurisdiction Act. As observed by Lawrence,

1. Aitch., Vol iv, p. 282; (Bhopal)

2. Butler Committee Report, para 35;

3. Ranbir Singh, *op. cit.*

4. Cited with approval by Sen, *op. cit.* p. 102;

"the term 'protectorate' as applied to the Empire in its relation to those Princes, and the description of their subjects when abroad, as entitled to British protection, is etymologically correct"¹ though it is distinguishable from the meaning attached to African Protectorates, for example. Mayne gave his opinion very much before the passing of the Foreign Jurisdiction Act. As the British Government had not been ceded jurisdiction for the trial of European British subjects, he rightly pointed out how they could not claim it. The source of British extra-territorial jurisdiction was the right of defending and conducting the external affairs of the Indian States involved in the Crown's Paramountcy. Even when such a right was claimed under the Foreign Jurisdiction Act, it was only as from an additional source as it were. Essentially Paramountcy was the source of that right.

The introduction of British jurisdiction into the States was one of the 'incidents and illustrations' of Paramountcy. This has been both in respect of certain classes of persons as well as certain areas. All European-British persons and foreigners, not subjects of British India, were unamenable to the process of State laws. Lee-Warner says: "In every Native State the combined authority of Parliament and the consent of the protected sovereign, either expressed or implied (perhaps presumed) may be regarded as the source of that widely extended personal jurisdiction over European and Indian British (not British Indian) subjects."² He regards such jurisdiction as *delegated*. He classifies it thus: (1) cantonment jurisdiction, (2) railway jurisdiction, (3) jurisdiction over civil stations and canals, (4) residency jurisdiction, and (5) personal jurisdiction over Europeans.³ He considers as *residuary* jurisdiction that power reserved by the British Government in respect of a class of subjects, such as over the Feudatories of Kolhapur, who were until restoration of jurisdiction to the State in 1930, under the Resident, for some purposes. This residuary jurisdiction may be based on treaty or usage. Jurisdiction is said to be *substituted* in cases where the native sovereign is set aside for a time.

1. Lawrence, *International Law*, p. 62;

2. Lee-Warner, *op. cit.* p. 329.

The Indian States were bound to provide all facilities of cantonment. The cantonments lay within the territories of the State. The troops stationed therein were under the control of the British Government. Where territory was not transferred, but only its use was ceded for some specific purposes, it is presumed that, but for what had been ceded, the sovereignty of the Ruler of the State was unimpaired. At the same time the Indian Princes could not rely upon the principles of international law that the jurisdiction in the cantonment area should be restricted only to troops and officers. The doctrine underlying the famous case *Laconia* that "as a matter of right no State can claim jurisdiction of any kind within the territorial limits of another independent State"¹ has no bearing whatsoever on the Indian States' liability to the Crown's foreign jurisdiction as they were not independent. The obligation of the States to afford facilities for defence and protection carried with it their duty to allow construction of railways. Territories are required for purposes not only of laying the track, but also for buildings, platforms, sidings etc. Areas had to be ceded for such works. A result of such cessions is apparent. The laws of the States ceased to be fully territorial. This cession of jurisdiction was not however equivalent to the cession of sovereignty. "The distinction between sovereignty and jurisdiction may appear subtle to some, but it is vital.....Where does jurisdiction end and sovereignty begin?";² this question is raised, but no answer is given. The Nizam's sovereignty over the Berars was in tact; but he had no jurisdiction there. It is an eminent instance of a compromise between nominal sovereignty of the one and the real jurisdiction of the other. On the ground that they had ceded jurisdiction and not sovereign rights, the Indian Princes demanded retrocession of all territories ceded by them for railway and cantonment purposes. "Many of the States seriously put forward claims for the retrocession of their 'sovereignty' over such (railway) land..... As the Davidson Committee pointed out, "if this claim were established and every State exercised jurisdiction on the same line between Delhi and Bombay, a train would encounter not less than thirty-eight

1. Mos. P. C. (N. S.) 183.

2. Shafa'at Ahmed Khan, *op. cit.* p. 180.

changes of jurisdiction during the course of its journey."¹ A military camp needs some civilian neighbourhood also. Either for business or on service, a civil population clusters round cantonments, intercourse between the civil and military personnel becomes inevitable. It is for this that there were, in addition to pure cantonments, 'civil and military' stations also.

The Residency area was deemed to be outside the limits of the State. Not only did the Resident enjoy exterritoriality, his retinue got the same diplomatic privileges. 'Residency' meant the residence of the Resident and his staff. But the acquisition of a large region of land for 'Residency' purposes and allowing people of the State to immigrate into it and claim exemption from the laws of the State, was often the case. The abuse to which the system was exposed, is ably pointed out by Raja Sir T. Madhava Rao, Dewan of Indore, in his letter to General Daly, Agent to the Governor-General. This letter is dated the 3rd July 1874. Speaking of the injustice resulting from allowing State-subjects to settle in the Residency area and claim exemption from State taxes, the writer draws attention to "the grave and manifold inconveniences... if the British Government should found and stimulate a town of its own in the very neighbourhood of our capital and claim for such town different laws, a different fiscal arrangement, and in short, quite a different system of management altogether"² To illustrate the consequences of such a step, the writer of the letter, the Dewan of Indore, says: "I would offer the picture of the German Ambassador in London demarcating a certain area around his residence, inviting lots of the London population to settle around, and claiming within such area the right of administering German laws and German system in general, and claiming for the whole settlement supplies totally exempt from the taxes of England."³ In substance the complaint is legally just; but the analogy is carried too far.

1. Shafa'at Ahmed Khan, *The Indian Federation*, p. 181; Also Davidson Committee Report.

2 & 3. Nicholson, *op. cit.* p. 133;

The principle of *qui maritinus*, that is of regarding ships of war as carrying with them their territorial character, can be applied only in cases of a special kind. Extritorial privileges were often claimed in favour of the entire suite of Ambassadors on the ground that their residence was part of the States wherefrom they came, "Exceptions are made in their favour. They are grounded on the dignity and independence of the States..... In former times they were carried to an extravagant extent..... An ambassador's residence was in most countries an asylum even from criminal justice."¹ Similarly the British Government claimed extritorial immunities for the European and American persons, and a corresponding extraterritorial right over them, while they happened to be in the States. Whatever may be the legal explanations offered, it is obvious that this right was claimed to secure special privileges to the Europeans and Americans. This is a case of political discrimination.

Formerly extradition between the Indian States and British India was regulated by treaties. But "the Indian Extradition Act 1903, provides a simple procedure which renders treaties unnecessary. The States are bound in any event to surrender fugitive criminals from British India.....Where the State seeks extradition of an offender from British India, it may proceed under its treaty; but it may ask the Political Agent to issue a warrant."² Before a State demands the extradition of a person accused of an offence, it must establish a *prima facie* case. It is the political officer who judges whether a *prima facie* case exists or not. Where extradition is sought by British India "the *prima facie* evidence which British Indian authorities should submit is for the satisfaction not of the State but of the political officer. As Colonel Newmarch wrote to the Gwalior Durbar, "if I consider the *prima facie* evidence sufficient, that opinion should be enough to justify the extradition and trial of accused persons by a British Court."³ The Local Governments of British India had discretion to decline to surrender offenders to the

1. Westlake, *Private International Law*, p. 266.

2. Keith, *Constitutional History of India*, p. 224

3. Sastry, *Indian States*, p. 84.

States notwithstanding a warrant issued by the Resident or other competent officer on behalf of the State. The principle underlying extradition was not so much reciprocity as it was Paramountcy and subordination. This is pointed out by Sen : "The jurisdiction claimed by the Government of India (over troops) cannot be effectively exercised without overriding fundamental and universally recognised rules of extradition; for if an offender who belongs to the British Indian army be arrested within the territories of an Indian State, it will be perfectly within the right of that State to refuse to surrender the criminal to British authorities."¹ In fact it has been held that no claim for extradition can be validly preferred except by the State within whose territory the offence was committed.²

But all judicial principles were ultimately interpreted and applied in the light of the relationship subsisting between the Indian States and the Paramount Power. If, for example, a Ruler of an Indian State had entered into a treaty of vassalage where by he undertook "to execute whatever orders that may be issued to him by the British authorities"³, it would be futile to argue of reciprocity. Even the Indian Extradition Act is discriminatory; Paramountcy permeates it. The Crown had its rights as Paramount Power to demand the surrender of any class of criminals; it could also refuse to surrender offenders in some cases,⁴ when the States requested their extradition. "The British Government expects the surrender of military deserters from the Imperial army, while it cannot extradite to a Native state a deserter from its army."⁵ As admitted by Lee-Warner, long before the enactment of the Indian Extradition Act, "strict reciprocity between the Paramount Power and the States in subordinate alliance is impossible."⁶

1. Sen *op. cit.* pp. 107-108;

2. *Rég Vs. Gänz*, (1882) L. R. 9 C. B. 93.

3. Aitch. Mandi Sanad, VIII, p. 364;

4. Indian Extradition Act, 1903, Set. 22, Ss and 15.

5. Lee-Warner, *op. cit.* p. 355;

6. *ibid.*, p. p. 357-358.

CHAPTER XVIII

Decline of Paramountcy

After the vicergerency of Lord Curzon, Paramountcy, appears to have lost much of its old vigour. The Princes who had all along smarted under the rigorous discipline of that great proconsul, must have sighed a breath of relief when Lord Minto assumed office. Here is a very telling confession of one of the Princes and it can be taken as a typical one. When asked by Mr. Montagu if they had any complaint, one of the Princes replied, "Not since Lord Minto's time."¹ While Curzon used to chide and chastise the Princes like school-boys, "since the time of Minto there has been a tendency to treat them as all but sovereign associates of the British Crown"² It has been observed that "A period of cordial co-operation began since 1905."³

Though Paramountcy was becoming a mild yoke, it should not be supposed that it began to lose ground. On the other hand its extent went on increasing even as its intensity was decreasing. Minto brought within its compass all matters of an Imperial or all-India character. He tried to interpret Paramountcy in terms of the States' relation to the rest of India. This, the Princes began to resent. However, he placated them. Curzon had repeatedly advised them to copy *European* systems of administration; but Minto assured them that he was opposed to "anything like pressure on the Durbars with a view to introducing British methods of administration."⁴ He pursued a "propiatory policy in respect of the Princes."⁵ The following three instances speak for themselves: "(1) The penalising of criticisms of Princes and Chiefs by newspapers etc., in British India—Cl. 4 (c) of the Act to provide for the better Control

1. Montagu *Indian Diary*, p. 243 ;

2. Schuster and Wint; *op. cit* p. 127;

3. Sidney Low, *op. cit.*

4. Minto's Udaipur Speech, *Butler Report*, para 29;

of the Press, No. 1 of 1910;... (2) The constitution of the family estates of the Maharaja of Benares into a 'State'...(3) The attempt to set up an Imperial Council of Ruling Chiefs." ¹ Minto preferred conferences with the Princes to issuing general directions without consultation. Lord Hardinge followed Minto's methods. He tried to bring about frequent meetings with the Princes and was keen on establishing some permanent organisation. War broke out before much could be done. From Curzon's policy of active and effective intervention, there was a resilience to a policy of indifference. The effects of it are described thus: "During the last 10 or 12 years (written in 1926), when the policy of the Government of India has been..... to leave the Durbars of our native States free and untrammelled, political officers have, as a rule not interfered unless gross misrule prevailed. The policy of relaxing control almost suddenly over a set of people who have long grown accustomed to rigid and indiscriminate discipline has had a very unfortunate effect." ²

Lord Hardinge regarded the Princes "as the helpers and colleagues in the great task of imperial rule." ³ War was on and national agitation against British rule had to be encountered anyhow. Mr. Montagu tried his best to improve the system of relationship with the States. As a realist, he thought that "the right thing to do would be to scrap all their treaties, provided they were willing to do so, and to form a model treaty for all of them." ⁴ He had his plans about the essential terms also, as is evident from his Diary. He and Chelmsford recommended the formation of a Chamber of Princes with a Standing Committee. "They recommended also that political practice should be codified and standardised." ⁵ They suggested that the Indian Princes should be invited for discussion in respect of matters concerning both the States and British India. The Chamber

1. Gundappa, *The States and their People*, p. 56.

2. V. S. S. Sastry, Rt. Hon'ble. *The Future of Indian States*, p. 20

3. Jodhpur Speech, Lord Hardinge, *Butler Report* para 30;

4. E. S. Montagu, *Indian Diary*, p. 281;

5. *But. Rpt.* para 32.

of Princes was a mere deliberative body. It did little work owing to the indifference of many major Princes and the spirit of eccentricity which characterised not a few of its members. However it became a common platform for the Princes to become collectively articulate and press for a definition of Paramountcy. All their efforts were primarily directed towards seeking a clarification of their position *vis à vis* the Government of India and the Crown. This was a common ground on which all the Princes could unite *inter se*.

Paramountcy had slumbered for years; as though it wanted to wax again before disappearing, it asserted itself most impressively in the treatment of the question of Berar by Lord Reading in 1926. In his celebrated letter to the Nizam, Lord Reading reiterated in the most emphatic terms the 'Sovereignty of the British Crown' being 'supreme in India'. He claimed that the right of intervention was another 'instance of the consequences necessarily involved' in the supremacy of the British Crown. He declined to get a new Court of Arbitration appointed to reconsider the Berar issue on the ground that the decision of the Government of India had been arrived at after full deliberation and discussion. He based his conclusions on the principle of *res judicata*. The Nizam was told that the title 'Faithful Ally' which he enjoyed did not have the effect of putting him in a 'category separate from that of other States under the Paramountcy of the British Crown.'¹ In fact almost all the Indian Princes were called 'allies'; for, had they not entered into a relationship of 'subordinate alliance'? At the same time they came to be described as under the 'suzerainty' of the Crown, the 'Faithful Ally' not excepted. As Lovat Fraser would say, "The words 'ally', 'feudatory' and 'federal relationship' are all inapplicable to the relations between the native States and the British Crown."²

The Indian Princes felt that time had arrived for them to seek a clarification of the complex problem of Paramountcy. Reading had not neglected his 'duty' towards them in spite of his

1. Reading's Letter to the Nizam,

2. Lovat Fraser, *India, under Curzon and After*, p. 208.

reassertion of Paramountcy. It was he who had 'certified' the Protection of Prince's Bill and made it a law. Yet the Princes were smarting under Paramountcy; their treaties had been violated by successive Governors-General. The relationship between the Crown and the Indian States which extended now for over a century and quarter, had remained nebulous and inchoate..... a hundred years of political somnolence had, in the case of many States, led to an ignorance, inconceivable to-day, of the rights of the States and where such rights were cherished, the documents were often incomplete."¹ What about duties? Were the Princes aware of them?

Lord Irwin proved a true friend of the Princes. He appreciated their anxiety about the definition of their relationship with the Crown. The Declaration of 1917 that the goal of the British was 'the progressive realisation of responsible government' in India; the publication of the Montagu-Chelmsford Report in 1918, the transfer of some responsibility to non-official ministers in the Provinces; the expectation of further democratisation of the Provincial Governments and introduction of some popular element in the Centre; the apprehensions of a Federal Government claiming the rights of Paramountcy over the States; and the certainty of a Statutory Commission, whose appointment was contemplated by the Act of 1919, recommending the granting of power by instalments to the Indian Legislature; these and other matters impelled the Princes to get their position defined and secured. It was one thing for them to acquiesce in the authority of the Paramount Power as long as it was exercised by a Viceroy responsible only to the Secretary of State, but quite another thing if it were to be exercised on the advice of Indian ministers.....responsible to an Indian Parliament. "² In response to their repeated requests Lord Birkenhead appointed a Committee on 16-12-1927.

The Indian States Committee was appointed to report upon the relationship between the Paramount Power and the Indian States. There were other subjects included in the terms of reference.

1. Panikkar, *The Indian Princess in Council*, p. 20;
2. Coupland *The Indian Problem*, p. 91.

Simultaneously nationalist Indians had, at an All Parties Conference, formed a Committee with Pandit Motilal Nehru as Chairman, to draw a constitution for India. Meanwhile, that is, in November 1927, the Simon Commission was also appointed. The Nehru Committee framed a draft constitution for the 'Commonwealth' of India possessing a 'Dominion' status. They claimed that the 'Commonwealth' would inherit Paramountcy. "The Commonwealth shall exercise the same rights in relation to, and discharge the same obligations towards, the Indian States, arising out of treaties or otherwise, as the Government of India has hitherto discharged."¹ They said: "if there are personal ties of allegiance or devotion which bind the Indian Princes to the throne, person or dynasty of the King, they cannot and ought not to suffer in strength.....when India attains Dominion status."¹ The Indian States Committee's finding on the nexus of Paramountcy was favourable to the Princes. The Committee recommended that "the Princes should not be handed over without their agreement to a new government in India responsible to an Indian legislature." The Statutory Commission recommended the substitution of a federal for the then existing unitary type of Central Government so that the States might also unite with the rest of India. Though the Commission was not sanguine about the institution of a federal form of government at an early date, it hoped that the federal idea would be realised in due course.³

In their Despatch on the proposals for Constitutional reforms, the Government of India said: "We accept the important distinction made by the Statutory Commission between the exercise of Paramountcy on the one hand, and, on the other, the normal treatment of matters which are of common concern to the States and to British India. It is only in respect of the former that the Commission recommends that the Viceroy should be statutorily vested with the functions now exercised by the Government of

1, Report, *All Parties Conference*, Art. 85, p. 122;

2. Rpt. 58;

3. *Simon Report*; ii, 146.

India "1 Again, they said: "The argument on which this proposal is based, though in part sentimental, appears to be cogent. It is on the King-Emperor that the loyal sentiments of the Indian Princes are centred and it is towards the Viceroy, as His Majesty's representative rather than as the Governor-General, that they feel the respect and devotion which is so valuable a factor in our dealings with them."1 These were the views of the Government of India. The Princes were invited to take part in the Round Table Conference, the first session of which commenced on the 12th November 1930.

The Indian Princes were against a strong unitary centre at Delhi. "The establishment of a unitary state, with a sovereign parliament sitting at Delhi..... is to my mind impossible. The constitution must be federal, and, while the Princes could not be in any way coerced, they would come into an all-India federation of their own free will, provided their rights were guaranteed", 2 said the Maharaja of Bikanir. He could speak of "their own free will", at last! "A unitary centralised Government for the whole of India including the States is impossible as the Crown is bound by its treaties and engagements with Indian Rulers to protect and maintain their sovereignty", 3 was the stand taken by the Princes. At first they were inclined to enter into a federal relationship with the rest of India. "The Maharaja of Bikanir's statement at the first plenary session of the Conference (Round Table) on the 17th November 1930, that the Indian States could best make their contribution ' to the greater contentment and prosperity of India as a whole.....through a federal system of government comprised of the States and British India ' was joined to a declaration that the States would never federate with a government of British India which was responsible to the British Parliament." 4

To allay the apprehensions of the Princes the British Government told them that the relations of the States outside the federal sphere

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1. Government of India's Despatch (September 20, 1930) para 213
 2. *Indian Round Table Conference*, (Cmd. 3778), 36-37;
 3. Haksar and Panikkar, *Federal India*, p. ix;
 4. John Coatman, *India—The Road to Self-Government*, p. 104;

would be with the Crown. "Responsibility at the centre would only be partial. The Crown meant to fulfil its treaty obligations, and must be in a position to fulfil them, especially as regards the military protectorate."¹ But the other problem was present; India would become a federal 'dominion' with the right of secession from the Empire. The opinion of the Indian States Committee that they could not be 'handed over' against their will, had encouraged them. But the Committee had declined to define Paramountcy. "The Chamber of Princes have from the very outset urged a satisfactory settlement of the claims of Paramountcy to be a condition precedent to the accession of the States to any federation.....Among the essential claims they had laid down from time to time, the one treating with a definition of Paramountcy has been made the *sine qua non* to any federation."² The first flush of enthusiasm which the potentates of Bikanir, Bhopal, Patiala and representatives from other States had shown for federation, slowly waned. "The Princes were now (1932) 'marking time'.³

In March 1933 the White Paper containing the proposals for the new constitution that was in the making, was published. Shortly afterwards a Committee of both the Houses of Parliament, the Joint Select Parliamentary Committee, with Lord Linlithgow as Chairman, was appointed to "consider the future government of India", with special reference to the White Paper proposals. "No more powerful parliamentary committee has ever been set up. It contained most of the leading men in British public life, including several who had held high office in India."⁴ It was the Report of the Joint Parliamentary Committee that finally constituted the basis of the Bill which became the Government of India Act of 1935. The part of the Act dealing with Federation, was not to operate until a specified number of States had acceded to it. The Indian Princes lost their old ardour for a federal association. They did not show

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1. Barton, *The Princes of India*, p. 299.
 2. V. R. S. Aiyer, *The Indian Constitution*, p. 243;
 3. Coupland, *The Indian Problem*, p. 130;
 4. *ibid*, p. 132.

any desire to accede; the Paramount Power had no interest in coercing them.

For one thing, the Act had nothing to do with the Princes' status and privileges. It concerned them only to the extent of subjects common to them and the Federal Government in case they chose to accede. Further, it provided for the appointment of a separate person to be the Crown's Representative in regard to the States. Paramountcy itself was wholly outside the purview of the Act. It was not defined; this was one of the reasons for the Princes' reluctance to join the federation. They thought that they would have to surrender a measure of sovereignty to the Federal Government without in any way escaping from the Crown's Paramountcy. "The Indian Princes do not want their States overrun by federal agents, their law courts subordinated to the British Indian Courts or their resources put at the disposal of any external authority."¹ Explaining the effect of the federal scheme as devised in the measure, Sir Samuel Hoare said: "First, the Bill, so far from worsening the position of the Princes in regard to Paramountcy, will make it better. Secondly, the greater part of the Bill has nothing to do with Paramountcy at all..... Thirdly, Paramountcy must be dealt with in the normal way in India. It affects the Princes, whether they federate, or not."² So the Act did not provide for them any escape from Paramountcy.

By federating the Princes they could have escaped Paramountcy to some extent. As Paramountcy had become all pervading, they could have entered into constitutional relationship in respect of many matters covered by Paramountcy. Their relations with the Government of India would have been to a large extent governed by treaties and instruments of accession. But to say that they would have attained an international status on the assumption that "The Instrument of Accession by which a State enters the Indian Federation is a

1. John Coatman, *op. cit.* p. 124;

2. *Parliamentary Debates*, Vol. 299, col. 1237.

treaty under International Law,"¹ is to draw an unconvincing conclusion from an unacceptable hypothesis. However, federal control would have replaced the old system to a considerable degree. It was stated in Parliament thus: "Many subjects such as railways, telegraphs, telephones, and so on mentioned by Lord Minto, will now come into the federal purview and if a State acceded to the federation, Paramountcy will not be applicable to that extent. Paramountcy will to that extent be limited."² Sir Tej Bahadur Sapru's assurance that "The basis of Federation is equality"³ and that there could be no 'Paramount unit' of any federation, could not dispel the doubts of the Princes' bloc. As remarked by Sastry, "Paramountcy in the absence of a cordial federation between British India and the Indian States, is bound to be an unending tutelage to the States."⁴ and the Princes endured it.

The problem facing the Princes was the security of their rights under the treaties which the Crown had agreed to respect, but which, they apprehended, would not be the case if ultimately the Federal Government should become responsible to the legislature. They calculated the risks involved. As remarked; "It is difficult to synthesise the promise of the King-Emperor to maintain unimpaired, the privileges, rights, and dignities of the Princes, with bringing the States as federating units in the federation for eventual evolution of the Indian union as a self-governing and sovereign entity. Sir William Holdsworth significantly says: "If in so far as the ministers who govern British India are made responsible to an Indian Legislature, in that event, and to that extent, they are incapable of acting as agents of the Crown in their relations with the Rulers of Indian States."⁵ Holdsworth's argument is more plausible than Coatman's. The latter holds that "the States would never federate with a government of British India which was responsible

1. Wajid Khan, *Indian States* etc. op. cit. p. 57;

2. *Parliamentary Debates*, Vol. 299, Col. 1235;

3. V. R. S. Aiyer, *op. cit.* 245.

4. Sastry, *Treaties, Engagements, and Sanads*, p. 308.

5. Singh Roy, *op. cit.* p. 158;

to the British Parliament " ! Were not the Viceroy and the Secretary of State responsible to the British Parliament ? The Princes' fears are thus indicated: " But suppose the British Crown was replaced at some future date by an autonomous Indian Government, could they then be as certain of the sanctity of their treaty rights ?"¹

By acceding to the Federation the rulers could have acquired a new place. " The right of the Crown in the exercise of power to determine the extent of its sovereignty asserted by Lord Curzon and reasserted in the most conclusive terms by Lord Reading stands unaltered; the way for the Rulers' to acquire authority is through federation. "² Still they were luke-warm. On the other hand, some " representatives of the larger States present a view that a definition and delimitation of Paramountcy outside the federal field would be impracticable and against the interests of the States inasmuch as having regard to the circumstances, they could not afford to weaken the authority of the Crown through a reciprocal contract. "³ This shows that they wanted to rely on Paramountcy which they had suffered unwillingly all along. Probably the halleluiahs of the Indian States Committee, " Through Paramountcy and Paramountcy alone have grown up and flourished these strong and benign relations between the Crown and the Princes on which at all times the States rely. On Paramountcy and Paramountcy alone can the States rely for their preservation through the generations that are to come. ", and the peroration " Through Paramountcy is pushed aside the danger of destruction or annexation. "⁴, must have commended themselves to them.

The Princes apprehended that there would be no compensation for the loss of their rights in the event of acceding to the federation. What was to be their gain ? As visualised by Sir Shafa'at Ahmad Khan, " Paramountcy, instead of being seriously affected by the new Act, may receive an accession of strength from the inevitable

1. Coatman, *op. cit.* 125;

2. Keith, *A Constitutional History of India*, p. 446;

3. Cumming, *Political India*, p. 275.

4. Butler Committee Report, para 57;

increase of federal influence and power over the federal (must be federating) States.....There is no Chinese Wall between India and Indian States.....In proportion as British India extends her influence and organises States' subjects.....the Rulers will cling closer to Paramountcy." ¹ Sir John Cumming's opinion has already been cited in the foregoing paragraph. He regards it as the view of the ' representatives of the larger States.' Sir Shafa'at anticipated the probability of " the Federal Ministry operating even in the sphere of Paramountcy with the consent and support of the Viceroy, in the same way as the prerogative power of the Crown is employed by English Ministers." ² The Princes preferred isolation to acceding to a federation; they thought that the source of their strength lay more in their relationship with the Crown than with a government of India responsible to an elected legislature.

The people of the States had no choice in the matter. They were not for remaining aloof. As provided in the Act it was the Ruler who had to signify his willingness to accede. As a matter of fact the subjects of a State were not at all allowed to figure in any matter concerning their constitutional position. " It is to be noted in this connection that curiously enough, and very regrettably, the people as distinguished from the rulers of the States have not been recognised at all as an entity with a *status quo*" ³ Nor were they so recognised previously. "The Princes refused to recognise them: the Butler Committee refused to hear them; the British Government refused to give them a place in the Round Table Conference." ³ The Rulers were preoccupied with their own personal rights. The urge for joining together with the fellow Princes and their own subjects so as to get into closer political relationship with the rest of India which was growing democratic, was not sufficiently present. The Crown would not use its authority to advise and persuade them. The inevitable followed; the federation never came into existence. How could it ever have when there was

1 & 2. Shafa'at Ahmad Khan, *The Indian Federation*, pp. 110-111, & 37.

3. Chintamani & Masani, *India's Constitution at Work*, pp. 172-73

neither common understanding among the Princes *inter se* nor a mandate from their sovereign?

Paramountcy had entered upon a stage of decline. The states could not be expected to unite with the rest of the country. "In some ways the India of the Princes presented a close parallel to Germany as it was before 1866. There was the same multitude of dynastic families.....the same particularist sentiment ... There were the same vested interests making for a continuation of the *status quo*." ¹ The Paramount Power had no occasion for any regret. Really speaking the Princes could have retained their individuality and outgrown their self-centredness. Any federation involves a balancing of local with national interests and neither need be sacrificed. Long before any federal plan for India as a whole was considered by Parliament, Keith had envisaged: "The only relationship between the great States and British India must be federal, so as to secure just regard for their interests and individuality, without creating any breach in the unity of India." ² But it must be remarked that the unity of India was a secondary matter to them. The preservation of their autocratic rule was their primary concern and no sacrifice was too much for it.

The Princes had misgivings that by entering into the federation they would be exposing themselves to the influences of British Indian politics. Even before the emergence of the Act of 1935 they were preparing a ground to hold themselves aloof. The Bill or the White Paper published earlier, did not mention at any place that dominion status would be granted within a particular period. There was not even any promise to that effect. The Act itself does not mention it. On the other hand it provides for an effective protection of the rights of the Princes. This is in addition to a guarantee that they would not be left to the 'mercy' of a responsible Indian government of India. Still they stuck to their guns: "It must be clearly understood that the Princes will accept no constitution which would even by

1. Schuster, *op. cit.* p. 132;

2. Keith, *Constitution, Admn. etc*, 260.

implication vest in any authority except themselves the right to decide their relations with their own people, the right to modify or alter their own policies, the right to the manner they.....like."¹ How could their joining the federation be expected when their exclusivism was so strong? Their desire for federating with the rest of India had become less than half-hearted.

When complete autonomy was established in the Provinces and popular leaders assumed office, there were repercussions on the States adjoining. The States' people clamoured for responsible government; the Princes stuck to Paramountcy. In his address to the Chamber of Princes dated the 10th March 1939, Lord Linlithgow, the Crown Representative, impressed upon the Rulers of States, "the wisdom of taking the earliest possible steps to combine with their neighbours in the matter of administrative services so far as practicable."² This was to bring the States together with one another, a preliminary to attachment. The Viceroy also assured the Princes that no pressure would be brought to bear on them in the matter of constitutional reforms; at the same time he added "Nor will any obstruction be placed in their way by the Paramount Power."³ In his reply to the address, the Chancellor of the Chamber of Princes, the Jam Saheb of Nawanagar, reiterated the Princes' claims. Drawing a distinction between "matters relating to improvement in administration and the question of constitutional reforms in the States" he said, "We claim that the decision with regard to the form and extent of constitutional reforms in the States must rest solely with the individual Rulers concerned."³ He added: "In order to encourage co-operative grouping.....it is essential that the combination should be entirely voluntary." The burden of his speech was that the "integrity and sovereignty of the States..... should not be impaired."⁴ Paramountcy was not employed to effectively persuade the intransigent Princes.

1. Panikkar, *The Indian Princes in Council*, p. 181;

2. *Federal Law Journal*, Vol. ii, 1939; p. 37;

3. *ibid*, pp. 43-45.

4. *Fed. Law. Jnl*, ii, 1939, 45;

India came into the War in September 1939. The British Government was more keen on getting the best from the Princes than losing their goodwill by the exercise of Paramountcy. Meanwhile national agitation for the attainment of freedom went on. In March 1942 Sir Stafford Cripps brought a Draft Declaration for discussion with the Indian leaders. This contained the conclusions reached by the War Cabinet. The proposals stated that on the cessation of hostilities India would have an elected body to frame its own future constitution. Provision was made for the States' participation in the constitution-making body. The Indian States were to 'appoint' representatives. The proposals were not accepted by the Congress. One good feature was that they recognised India's right of self-determination. "Cripps' offer to India of permission to frame a constitution which would permit the right to secede from the British Empire" remarks Keith "creates a position of great difficulty for the Empire. It is an entirely new doctrine. Its introduction is grave."¹ But does not the Statute of Westminster recognise this right in favour of the Dominions? The Princes had prolonged negotiations with Cripps. They said: "They will be glad, in the interest of the motherland, to make their contribution in every reasonable manner compatible with the sovereignty and integrity of the States, towards the framing of the new Constitution for India."² The Congress "objected strongly to the position of the States, and demanded that their representatives should be chosen by elections."³ Accepting the Congress view implied loss of power and prestige which the Princes could never suffer,

The Indian National Congress as well as the Muslim League were earnest about acquisition of Dominion Status, the former for a united India and the latter for a divided India. In any case, Dominion status was not far off. What was to be the position of the Princes then? "At each stage in the development of self-government in British India they have asked for re-assurances that

1. Keith, *The Constitution under Strain*, p. 32;

2. Coupland, *The Future of India*, 145;

3. Keith, *ibid.* p. 30.

their treaties will be honoured, and never with more insistence and more evident anxiety than now, when the end of the process was in sight.....Would not the States' governments stand on a lower footing than the government of an Indian Dominion?.....They would not feel that they lost prestige because their States were under the King - Emperor's protection."1. The Princes preferred to retain their present status; "The King - Emperor would still be their Suzerain. They would ask, as they have asked before, for a definition of Paramountcy."2 The Princes made a fetish of their treaty rights. The Paramount Power had time and again declared that treaties were not the sole source of Paramountcy. After all the treaties "have been transformed by a continuous process of interpretation and erosion beyond recognition. The treaties have not succeeded in safeguarding the rights of the States or their Rulers..... They are wholly unreal."3 The Paramount Power could have told the Princes that "A treaty of perpetual obligation is unknown to law."4 But it would not.

Early in 1946 a Parliamentary Delegation visited India and after their return, a British Cabinet Mission was sent to India "to take positive steps.....to promote early realisation of full Self-Government in India." In their historic Statement they said: "that with the attainment of Independence by British India.....the relationship which has hitherto existed between the Rulers of States and the British Crown will no longer be possible. Paramountcy can neither be retained by the British Crown nor transferred to the new Government."5 About the end of 1945 the Sapru Committee had said: "British suzerainty which is the mainspring of Paramountcy jurisdiction to-day, will have to cease to exist.....and the new Union centre will come to exercise that jurisdiction over the unfederated States," 6

1. Coupland, *The Future of India*, p. 145;

2. *ibid.* p. 144;

3. K. T. Shah, *Federal Structure*, p. 48;

4. N. D. Varadchari, *op. cit.* p. 59.

5. *The Indian Annual Register*, 1946, Vol. 1, p. 146;

6.do.....1945, Vol. 2, p. 179.

So an escape from Paramountcy was possible through federation. The States could not think of constituting themselves into a 'Dominion' under the Crown; Paramountcy would no longer be retained. The Princes welcomed the declaration of the Cabinet Mission in regard to Paramountcy. Though the Cabinet Mission scheme of May the 16, 1946 failed, its declaration concerning the States remained operative. Accordingly the Indian Independence Act of 1947, declared under section 7, the 'lapse of suzerainty.' There could however be no devolution of 'British Paramountcy' as it was unequivocally relinquished. Paramountcy may be said to have entered the penultimate stage of its life on the outbreak of the second World War in 1939. Its decline which had begun since Lord Minto's regime was accelerated by the two wars and the political events in the country. Its fall synchronised with the birth of the twin Dominions of India and Pakistan. As Coupland puts it "Paramountcy and Dominion status are manifestly incompatible. Whether in a united or in a partitioned India, Dominion status means the end of the treaty system."¹

The end of the treaty system was to this end, namely, the end of the undemocratic Indian State system.

1. Coupland, *The Future of India*, p. 144.

CHAPTER XIX

Fall of British Paramountcy.

What was rung out on the midnight of the 14.15th August 1947 was not Paramountcy proper; it was *British* Paramountcy. There is a clear distinction between the two. Britain's relinquishment of authority over the Indian States could not *ipso facto* sever the tie which subsisted between the Indian States and the Government of India. The British Government had committed itself against transferring Paramountcy to any other authority without the consent of the Princes. This pledge was fulfilled. On the renunciation of Paramountcy by the British Crown the Indian Princes began to declare themselves independent. At best their States were restored their *status quo ante*; and we have already seen that no surviving State was independent before coming under British protection. An escape from British Paramountcy does not mean an attainment of independence. In the words of Rajaji, "The doctrine that with the withdrawal of British sovereignty paramountcy as such ends and that as a consequence the 500 and odd rulers of Indian States automatically attain an 'independence' which they had never enjoyed, either in the pre-British days or during the East India Company's rule, is indefensible. Legally and historically it is entirely wrong..... The independence that is sought is a misnomer."¹ Elsewhere the claim of Travancore to independence has been examined. Rajaji describes it as a "zamindari enfeoffed to the Nawab of Karnatak (See Aitchison's Treaties)." Notwithstanding this, Sir C. P. Ramaswami Aiyer maintained that "The position of Travancore is *sui generis* and the policy of Travancore to assume and maintain an independent status will not be affected."²

It is interesting to note the change of attitude of the British towards the Princes' claims to independence. The Indian States

1. *Free Press Journal*. 28-6-47;

2. *Times of India*, 18-6-47;

Committee had summarily rejected the Princes' claim. A fast friend of the Princes' cause, even to-day, Sir William Barton has unequivocally stated that "No surviving State in India is in direct descent from the Empires of the past."¹ They were after all vassals or tributaries of one of their contemporary sovereign powers. But, as pointed out by Pandit Jawaharlal Nehru, "A new theory of the independence of the States has been advanced in recent years..... by the very Power that holds them in an iron grip and keeps them in subjection. Neither history nor constitutional law gives any justification for this, and, if we examine the origins of these States, most of their rulers would be reduced to the status of feudal barons"². The British who succeeded to the suzerainty of the old Powers could not, by an act comparable to what the Roman jurists would call *donatio mortis causa*, confer an independence on the States simultaneously with their renunciation of Paramountcy. In the opinion of Dr. Lankasundaram, "the abolition of British Paramountcy is euphemistically called the revesting of the States with the attributes of sovereignty."³ Revesting is all right; but investing them with what they never had is quite different.

The States were entitled to regain only their pre-Paramountcy status. When there was the lapse of British Paramountcy and the States were declared by the British Parliament as extricated from all obligations appurtenant thereto, there was a claim made by the Princes that they were the legatees of such of the powers as were denied to them till then. The States' people on the other hand regarded that it was not the Princes who gained a new status but it was the States and as intergal parts of India. The problem is, who were the reversioners of authority? The Indian Independence Act speaks of "lapse of the suzerainty of His Majesty over the Indian States". Does 'States' connote the Princes only? In all their dealings with the Indian Princes the British have recognised the Ruler as the repository of sovereignty. The

1. Barton, *Princes of India*, p. 43.

2. Jawaharlal Nehru, *Unity of India*, p. 32.

3. Lankasundaram, *Union Finance*, p. 7.

Paramount Power has respected the archaic principle of Ruler-Sovereignty as distinguished from State-Sovereignty. The latter has wider implications; it includes the people of the State as well, whereas the former presupposes the identity between the Ruler and the State. But technically the 'State' in terms of their people got nothing from the British bequest. It is clear from the Draft Instrument of Accession that the 'States' in the context meant the Princes

On the lapse of *British* Paramountcy the States could not escape the Paramountcy of the succession State. As Dr. Ambedkar said : "The Indian States will be sovereign to the extent they are, but they cannot be independent so long as they remain under the suzerainty, as they must, of the Crown, if India remains a Dominion, or of the succession State, if India becomes independent."¹ Characterising the doctrine that Paramountcy cannot be transferred, as a mischievous one, he proceeds : "The protagonists of this theory rely on the omission from the Government of India Act of 1935 of the provisions of section 39 of the Government of India Act of 1833 (reproduced in section 33 of the Acts of 1915 and 1919) according to which the civil and military Government of India (as distinguished from the civil and military Government of British India) is vested in the Governor-General in Council and argue that the omission is evidence in support of the conclusion that Paramountcy could not be transferred to an Indian Government. To say the least, the argument is puerile." He adds : "That Paramountcy will lapse is a most astounding statement and runs contrary to the well-established principle of constitutional law that the King cannot surrender or abandon his prerogative rights. If the Crown cannot transfer Paramountcy, the Crown cannot also abandon it."

Could it not have been possible for Parliament to transfer Paramountcy? Was it an unassignable commodity? We have seen how Paramountcy was a *de facto* authority established long before the Crown assumed the direct governance of India. The

1. Times of India, 18-6-47.

Company's policy of annexation, intervention, or protection were part of "the settled public law of India repeatedly acted on by the Indian Government and sanctioned by the Court of Directors", writes Sir Charles Jackson, Advocate-General of Bengal, and later, Judge of the Supreme Court." It was Parliament through the President of the Board of Control that directed the policy of the Government of India. As pointed out by Rajaji, "Parliament was the ultimate authority that made all the annexations and created all the subordinate sovereignties.....When it transfers authority and responsibility from itself to a sovereign authority in India, it cannot isolate the powers and obligations built under its authority in inextricable association with its rule in India, and ordain their extinction in order to oblige the Princes. It (Paramountcy) does not terminate under any rule of law, domestic or international."¹ We have elsewhere discussed the other proposition that Paramountcy is not contractual, and that is a real relationship. "The treaties were between the Indian princes, as the heads of their States, and the Government of India. "The proposition that treaties.....between States are personal and not national has been negated by Law Officers of the Crown as early as 1764.....The Indian Independence Act has apparently ignored the fundamental principle of the doctrine of nationality of treaties."² The relations between them and the Crown was never personal and direct. It was legally both possible and proper to transfer Paramountcy to a duly constituted Government of India responsible to the people. Paramountcy which subsisted for the benefit of all-India must necessarily enure to the benefit of the same irrespective of the withdrawal of British authority.

The unilateral declaration of the British Cabinet Mission that Paramountcy would terminate on Britain's withdrawal from India could not however affect the invitable bond which knits the States with the rest of India. If the British declined to transfer Paramountcy, it does not follow that it would not devolve upon the successor Government. The British left India in a most disintegrated state

1. Free Press Journal, 28-6-47; Por C. Rajagopalachari.

2. Nambyar, *Federal Law Journal*, x, 128.

and enunciated the disruptive doctrine of the States' independence consequent on their exit. "The highest fulfillment and justification of Paramountcy would have been in her (Britain's) bringing the States into an independent national polity."¹ But was Britain keen on leaving a strong united India? The Princes, once let loose, were out to assert themselves. Pandit Jawaharlal Nehru had already written thus: "There is no independence in the States and there is going to be none; for it is hardly possible geographically, and it is entirely opposed to the conception of a free united India".² Paramountcy came into being to build an Empire in India. "The interests of India as a whole"³ was one of the grounds for the exercise of Paramountcy. Britain's gratuitous conferment of independence on the Princes could not create a constitutional vacuum or void. Paramountcy would be acquired by the succession State by transmission if not by transfer *inter vivos*. Paramountcy is an inheritance of India and "A Government that quits cannot disinherit the Government that comes in."⁴ But how did this obligation to declare lapse of Paramountcy arise? It is based on the findings of the Butler Committee.

The Indian States Committee said: "The States demand that without their own agreement the rights and obligations of the Paramount Power should not be assigned to persons who are not under its control, for example, an Indian Government in British India responsible to an Indian legislature."⁴ Princes who would not grant responsible government under their own *aegis* could not be expected to accept the Paramountcy of the people of India. The apprehensions of the Princes are evident. "The constitutional writings of the time would show that they were looking forward to the day when the British Indian central government would inherit from the Crown the full armoury of Paramountcy and would be able to exercise its Paramountcy powers in the same way as the Cabinet of England—a proposition wholly unacceptable to the

1. Gundappa, *The Indian Independence Act*, p. 11;

2. Nehru, *Unity of India*, p. 32;

3. Nambyar, *Federal Law Journal*, Oct. 1947.

4. *Butler Committee Report*, para, 58;

Princes and the States"¹,— not necessarily to the 'States', but perhaps to the writer himself. The Indian States Committee say: "In view of the historical nature of the relationship between the Paramount Power and the Princes, the latter should not be transferred without their consent to a relationship with a new government in British India."² The Committee talk of 'Princes', and 'States' as though they are convertible. They do not mention what the legal obstacles to the transfer of Paramountcy were. They put a premium upon the 'historical nature of the relationship'; they could have as well brought to bear upon the present relationship the much-needed historical perspective. Having once accepted the proposition that the treaties of the Princes were with the Crown and that the Crown, in the event of the establishment of responsible government in India, could not control it, the Committee were obliged to recommend as they did.

Reference has been made to the efforts of the Ruler of Indore to get the principle of 'direct relationship' recognised by the British Government. The supporters of the Princes made out a case that the treaties were directly with the Crown and could not be expected to be respected by persons other than the agents of the Crown. They argued that the treaties depended for their due observance on personal faith and mutual confidence. Joshi characterises this theory of personal relationship as a "novel theory" and regrets that it "introduces an element which may effectively hamper the growth of responsible Government in India."³ Are the treaties like those whose specific performance requires such qualities as are purely personal in character? Are they like contracts recognised by the Specific Relief Act as dependent for their performance upon personal qualities which cannot be communicated or transmitted to an agent, delegate or successor? If not, "May one ask, on what principle of law, when a contract may be performed by an agent (we may add, a successor), can the choice of the agent be

1. Panikkar, *Indian Princes in Council*, p. 13;

2. *But. Rept.*, para 58.

3. Joshi, *op. cit.* 102;

made to rest, not with the principal, but with the other party to the contract ? ”

Keith was one of the first exponents of the obligation of the Crown under consideration. With reference to the ‘ doctrine of trusteeship for native races in south Africa ’ and Britain’s obligation, he wrote: “ I cannot conceive what moral right the British Government has to transfer to a completely independent Government which claims the rights of secession, tribes without their consent..... The position is exactly as in the case of the Indian States, in whose case Britain has definitely accepted the impossibility of alteration in their direct relation with the British Crown without their consent Respect for the doctrine (trusteeship) forbids handing over territories against the will of their people to a Government which stands with complete consistency of principles and practice for the subordination of natives (African) to European interests.” What a comparison and what logic ! The Indian people are not ‘ primitive tribes ’; secondly, there is no correspondence between the African people and the Indian Princes who are in each case the persons whose consent is deemed necessary ; thirdly, with reference to transfer of power, Keith speaks of ‘ moral rights and duties ’ in one case, and an implied legal impossibility in the other. Fourthly, in the case of African possessions there may be some truth in his solicitude for the tribes whom he does not want to be handed over to an alien power ‘ which stands with complete consistency of principle ’ etc for colonial exploitation. But to bring in India which has all along been wedded to a policy which is its very antithesis is most unfair and inaccurate.

As pointed out by Sir Sivaswami Aiyer, “ Keith’s view is based on a fundamental misconception of the nature of treaties entered into by the Indian States. Was it with the British Crown as representing the Paramount Power in India or otherwise ? If it was with the British Government, was there any understanding, express

1. Pyarelal, *op. cit.* p. 25;

2. Keith, The King, *The Constitution and the Empire*, pp.88 & 79.

or implied, not to introduce such changes in the administration or constitution as might be required from time to time?..... There is no analogy between the present case and the hypothetical case of transferring the coloured races in Basutoland to the control of the South African Union."¹ Sastry rightly says: "Dominion status, when granted to India, will create, not a new State but only an autonomous State. The Parliament of Great Britain can always cede the exercise of its Paramountcy to ministers responsible to an Indian legislature." The South African analogy has no applicability whatever to the case of the Indian States *vis à vis* the Government of India. But the Princes' view was: "If and in so far as the ministers who govern British India are made responsible to an Indian legislature, in that event, and to that extent, they are incapable of acting as agents of the Crown in their relations with the Rulers."²

Holdsworth gave great currency to the obligation of the Crown about the non-transferability of Paramountcy in any event. "The Crown," he said, "cannot cede its rights and duties as Paramount Power to any other State..... Usage accepted by the Princes is the most important basis of Paramountcy and since Paramountcy resting on this basis is a source of a separate part of the prerogative, no alteration in this usage or in the prerogative resulting from it can be effected without the consent of the Princes".³ Long before the dicta of Holdsworth were pronounced the Princes had begun to press their claims. The expectation of national India "that British India would be made self-supporting and Paramountcy over the Princes would in future..... automatically be the heritage of a responsible Government of India",⁴ filled the Princes with feelings of concern about their treaty rights. Could not a prerogative be regulated by parliament? "The prerogative of Paramountcy can certainly be controlled or abridged or even taken away by Parliament. It follows

1. P. S. S. Aiyer, *Indian Constitutional Problems*, pp. 214-215 ;

2. B. P. Singh Roy, *Parliamentary Government in India*, p.158.

3. Holdsworth, *Law Quarterly*, xlyi, 429 ;

4. Barton, *India's Fateful Hour*, p. 32;

therefore as a corollary that the British Parliament can transfer the whole content of Paramountcy."¹ But the Crown's conscience would not permit it to break its pledge. Cripps expressed his opinion that "Paramountcy cannot be continued after the new constitution comes into operation, nor can it be handed over.....A contract or agreement of this kind cannot be handed over to a third party etc."² Had not the Indian States Committee rejected the 'Paramountcy Agreement' theory of the Princes? Cripps recognises it now. The Indian Government is a 'third party'; when was the Crown a party to the treaties? Its undertaking to respect the treaties which had already been entered into is quite different from its being a party to the treaties.

How did this obligation arise? It is only on the Crown's acceptance of the interpretation of the treaty relations which suited its interests that it undertook to save the Princes from coming under an Indian Government of India. Either the treaties are personal or not. In the former case they are entered into by both the parties in their personal capacity. The States are not the personal property of either. They cannot bind the States. If as heads of the States the two have entered into treaties, there is no occasion to import the personal element. The argument that the Crown's prerogative powers of Paramountcy are unassignable fails on this ground. Are there any 'personal' prerogatives operating in the constitutional sphere which Parliament cannot control? This has been examined already. Professor Keith said, probably with a prescience: "There is in fact no answer to Mahatma Gandhi's claim that the Princes are bound to follow the Crown in its transfer of authority to the people." This is evident from what has happened during the months following India's attainment of independence.

The following Resolution of the All India Congress Committee during its session in New Delhi on the 15th June 1947³ is worth some examination. It says, among other things, that "The relationship between the Government of India and the States would not be

1. Bhattacharya, *op. cit.* p. 94;
2. *The Annual Register*, 1946, 1, 155.
3. *The Hindu*, Madras, 16-6-47;

exhausted by the lapse of Paramountcy. The lapse does not lead to the independence of the States..... The arrangements made under Paramountcy in the past dealt, *inter alia*, with the security of India as a whole..... which question is as important to-day as at any time previously." Is not this right and responsibility of defence one of the inalienable and non-disinheritable properties of the sovereignty to which the Dominion has succeeded? By operation of law Paramountcy is transmitted to the national Government. We have seen how the rights of Paramountcy are attached to the Sovereignty of British India. "Some of the attributes of the Paramount Power..... must become vested with the Union Centre, for otherwise the Indian Union would become widowed of power and purposiveness..... it would lack stability and would crumble."¹ This desire and anxiety can be understood. Some powers of Paramountcy cannot lapse. In the very nature of things they are bound to devolve on the Dominion Government; else, a substitute authority will emerge.

Mr. Gadgil argues that "once an Indian State is admitted as of a given status, its position could not be changed, either in theory or in practice, except by a process of constitutional amendment."² This is true; but what is that status which the States secure? What about such of the States as having acceded to the Union at present refuse to enter into any federal relationship with the Union that is coming? The State wherein the people do not possess sovereign power would be an anomalous member of a democratic Union. A perusal of the draft 'Instrument of Accession' shows how it speaks only in terms of the sovereignty of the Ruler. "If the right and authority of the people is not made explicit in so important a document, the Union would have left to itself no ground for even remonstrating with a Ruler whose rule is bad and has led to serious civil disorders."³ This is indeed a very unhappy omission. Further, a Ruler is given a choice under clause 7 of the Instrument of Accession to accept or not to accept any future constitution of India. Then what would be the relationship between States which, having

1. Dr. Lankasundaram, *Union Finances*, p. 13 ;

2. Gadgil, *op. cit.* p. 183;

3. Gundappa, *Indian Independence Act*, p. 39.

acceded to the Dominion, do not desire to enter into the Union? Secondly, if a State does not have a fair standard of administration as well as some popular element in its constitution, could its relationship with the Union in case it seeks to enter into a federal association, be governed by the compact merely?

A State is not as a matter of course entitled to secure a place in the Union. Its accession to the Dominion is not by itself sufficient qualification for Union membership. The Union Government may insist on the reformation of the internal constitution of the States before accepting them as members of the federation. Mr. Gadgil cites the case of the United Nations Organisation which refuses admission to fascist States. Such States can go on without the U. N. O.; but can the Indian States which are refused membership on the score that they have not transferred power to the people, live independently of the Union? What is the mode in which the States might be successfully prevailed upon to effect constitutional reforms before becoming eligible for Union membership? "The Indian Independence Act can hardly help the Princes to declare their independence against the will of the new Dominion" says Nambyar. The sanction behind that will is the sovereign will of the people of India, although the people in the States have been denied this right. "The Act which frees the Princes from the fetters of Paramountcy also frees the new Dominion of all legislative restrictions." He continues, "It is legally open to the new Dominion to abrogate the abrogation of Paramountcy by passing a new law to that effect."¹ This proposition cannot be easily accepted. Would it be within the powers of the Dominion to make a law conferring up on itself jurisdiction over the States without their consent?

The Draft of the new Constitution for India provides for the repeal of the Indian Independence Act. There will be an *ipso facto* abrogation of the abrogation of Paramountcy. But would that operate retrospectively? It is doubtful. As Paramountcy *per se* continues to reside in the Government of India, it makes no difference whether the powers comprised in it are acquired *de novo* by the Dominion Government, through legislation, or otherwise.

1. Federal Law Journal, Oct. 1947.

CHAPTER XX

The New Deal.

If Paramountcy did not lapse on the 15th August 1947, it acquired a new character. If, on the other hand, it is assumed to have lapsed, a substitute authority emerged. In any case the States could not become independent. Speaking at a meeting of the All India Congress Committee, Pandit Jawaharlal Nehru said: "There is a certain inherent Paramountcy in the Government of India which cannot lapse; an inherent Paramountcy in the Dominion State in India which must remain because of the very reasons of geography, history, defence etc., which gave rise to it when the British became the dominant power in India. If anybody thinks that it lapses, then those very reasons will give rise to it again."¹ This is not mere rhetoric. Mr. D. V. Gundappa takes exception to Pandit Nehru's use of 'Paramountcy', and says that he must have meant it as a *force majeure*, the pressure of solid fact." He proceeds: "Strictly speaking, Paramountcy is a species of that very imperialism upon which Pandit Nehru has waged ceaseless war all these years. Paramountcy implies the existence of vassals or feudatories..... The name proper for the kind of authority that Pandit Nehru would secure for the Dominion of India is 'federal authority'. Federalism is as far from Paramountcy, or hegemony, or imperialism, as democracy from despotism..... We to-day look for equality. No more overlordships and no more fiefdoms."² Paramountcy *per se* is not so objectionable. The British used it for imperial ends; it does not follow that it cannot be employed for national purposes. The abuse of a thing is no argument against it. The Indian States need not be feudatories or vassals of the central government; but they do depend for their protection on the Dominion. They have no international life; they have no independence, and even their sovereignty is inchoate. They are not entitled to claim the position of partners as their status is inferior to that of the Union.

1. N. N. Mitra, *The Indian Annual Register*, 1946, i, p. 213;

2. Gundappa, *Indian Independence Act*, p. 21;

Federal authority 'is a term appropriate when the two units are on a par. There are bound to be a large number of problems unprovided for in the federal constitution. There must remain in the hands of the Dominion not only the usual 'residuary' authority, but considerable discretionary jurisdiction. No human constitution, which attempts to bring together highly incongruous units, can make provision for all contingencies. Pandit Jawaharlal Nehru advisedly used the term 'inherent Paramountcy' and paraphrased it as one distinguishable from the imperial British one. By 'inherent' he meant that which was innate in the sovereignty of India and which did not depend on any transfer by the outgoing Power. The successor Government is entitled to all the rights which were part of, though distinguishable from, the Sovereignty of the British Crown which was 'Supreme in all India.'¹ According to Mr. Gadgil, Paramountcy, "this useful and elastic means of dealing with the Indian States, will not be available to the Government of the Indian Union. The Union will wield only the powers ceded to it."¹ This view is based on the assumption that the relation between the States and the Union would be purely federal. But a perusal of the Draft Constitution of India shows how the Union Government is likely to be federal in form but unitary in substance. This is not the place to examine the various provisions set forth in that document to substantiate and illustrate this opinion. It is enough to point out that the authority exercisable by the Union over the States is bound to be something more than, and different from, what is purely federal.

A survey of the events since India's attainment of independence reveals the emergence of that Paramountcy which Pandit Jawaharlal Nehru anticipated in his address to the All-India Congress Committee a year earlier. On the 15th August 1947 a large number of States proclaimed themselves independent. Almost all of them had already acceded to the Dominion, as against the sceptical prediction or wishful thinking of a senior officer of the old Political Department, that "not one State will accept the Instrument of Accession as

1. Indian States Committee's Report, para, 22.

2. *The Federal Problem in India*, p. 183 ;

proposed by the newly formed Ministry of States."¹ Practically all the Princes acceded to the Indian Dominion before the transference of power. It is one thing for a State which had not yet chosen to accede to either Dominion to declare herself independent; but States which had surrendered powers concerning Defence, External Affairs, and Communications also claimed that they had become independent. Long before the 15th August the Nizam had proclaimed that he would become independent. His *firman* stated that he would accede to neither Dominion. A few States acceded to the Dominion of India after the 15th having enjoyed a spell of independence. Though the old relationship based on treaties etc. between the Crown and the States terminated on the 15th, the Princes' accession to the Dominion whose constitutional head represents the Crown is inconsistent with their claims to independence. An acceding independent State is a constitutional impossibility.

The States were given a choice to accede to either Dominion but they were advised to bear in mind certain factors before making any decision. These were the wishes of the people, and geographical and economic considerations. It is natural that a State, contiguous to a particular Dominion, must align itself with it; it is much more natural and highly desirable that this should be done when the subjects of the State are also for it. Technically however a Ruler was not bound to appreciate either factor; geopolitical facts may be actually compulsive, but they are not legally imperative. Junagadh created a problem by acceding to Pakistan; Kashmir could not help acceding to India; Hyderabad declined to accede to either Dominion.

The Rulers had to enter into fresh relations with the Dominion. There were two forms of Instruments of Accession. The standard form was signed by all Rulers who enjoyed full powers before the 15th August 1947 and whose Accession was accepted by the Indian Dominion. The alternative Instruments of Accession were signed by Rulers who did not enjoy such full powers and who

1. Per Sardar Patel, 29-1-48. (cited in Free Press Journal, 6-7-48)

had to cede to the Government of India residuary civil and criminal jurisdiction. If all small States were recognised as sovereign States with full powers, the resulting position would be utter chaos" ¹ Execution of this alternative Instrument of Accession by the semi-jurisdictional States is as good as an acceptance of a measure of Paramountcy of the Dominion. Under Paragraph 2 the Ruler says: "I further declare that the Dominion of India may.....exercise in relation to the administration civil and criminal justice in the State, all such powers authority and jurisdiction as were at any time exercisable by his Majesty's representative for the exercise of the functions of the Crown in its relation to Indian States" (in other words, of Paramountcy).

When Junagadh joined Pakistan some of the States connected with it acceded to India. These were Babariawad, Mangrol etc...: Junagadh wanted these to accede to Pakistan on the ground that they were its feudatories. On the other hand the Rulers of these States maintained that they were free to accede to either Dominion on the score that they were not Junagadh's tributaries or feudatories. Legal opinion supporting each of the parties was advanced. In his statement ² to the Press Sir Shah Nawaz Bhuto, Prime Minister of Junagadh, referred to the history of some of these States and said that they were parts of Junagadh. But prior to 15th August 1947, which is the only relevant date, they were 'Attached' to Junagadh; they got detached forthwith. About Junagadh itself, the Dewan was right when he pointed out that the question of geographical contiguity was not at all referred to in the Indian Independence Act. In the Cabinet 'Mission's Memorandum on State's Treaties and Paramountcy', dated the 22nd May 1946, there was no such reference.³ It was Lord Louis Mountbatten who said at a Press Conference on the 4th June 1947 that the States had to elect accession to either Dominion not ignoring geographical and economic

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1. Per, Sardar Patel, *Constituent Assembly Debates*, Vol.1.No.3 P. 167.
 2. The Times of India, 29-10-1947.
 3. *Annual Register*, 1946, i, p. 210 ;

considerations; and the wishes of the people. He added that Britain would not let the States enter the British Commonwealth separately as Dominions.¹ But complications arose in Junagadh. The Indian Dominion Government which had properly accepted the accession of Mangrol and other States was approached for military help as the Nawab was coercing them to join Pakistan. Indian armies had to be sent to those places. The Nawab protested; Pakistan would not intervene. It also protested against the policy of the Government of India. There was no violation of the rights of the Nawab. It was a question of protecting a few States which had acceded. The Nawab's conduct was such as to affect the peace and security, not only of these few States, but also of the adjacent Dominion territories. Meanwhile the Nawab fled to Pakistan. A provisional Government was set up in Junagadh. On behalf of the Nawab the Dewan of Junagadh asked the Government of India to take over the administration of the State. But the Government of India postponed accepting accession until a referendum was taken. This was done in February 1948. The verdict of the people was in favour of accession to the Dominion of India.

Kashmir did not accede to either Dominion. It lies contiguous to the territories of both the Dominions. It entered into a Standstill Agreement with both pending its final decision as to accession. Owing to circumstances beyond her control she was obliged to seek the help of India. She first sought the aid of Pakistan against certain acts of aggression committed by tribesmen operating from areas under the control of Pakistan. There was something like a regular armed campaign against Kashmir which the State could not resist single-handed. Constitutionally, as Kashmir had not acceded to India, the Dominion Government could not give her succour. The Ruler of the State applied for accession which was a condition precedent to any military assistance that could be given to her. In October 1947 the Dominion Government accepted Kashmir's accession purely as a tentative or provisional measure leaving the ultimate choice to the people themselves. It was constitutionally not

1. „Times of India, 5-6-47.

improper for India to have taken Kashmir's accession as a permanent settlement. The Instrument of Accession refers to the Ruler as the *Sovereign of the acceding State*. Whatever might be the political rights of the people, in the eye of law, it is their Ruler who represents the State. Still the Dominion Government was not inclined to act solely on the basis of the Ruler's desire for accession. The Dominion Government wishes to take a final step only when a referendum is held and its results are known. As the matter is still before the United Nations Organisation Security Council, it may be considered *sub judice*. The Indian Government however wishes to abide by the verdict of the people of the State, that is, a ratification of the accession by a plebiscite. This principle it has chosen to respect always.

The Nizam waited and watched for a long time. After protracted negotiations a Standstill Agreement, for a year only, was reached. He would fain accede to Pakistan if only he could. He was for a pact, 'treaty' or 'instrument of association' with India. He wanted to be treated as a sovereign apart from the rank and file of fellow Princes. His spokesmen advanced the usual arguments; size and income of the 'Dominions', the special title 'faithful Ally', the historical greatness of the State etc. The issue of all discussions was a temporary agreement reached in November 1947. Except for the fact that its duration is for one year only, it is practically identical with any other Instrument of Accession. The Nizam has surrendered all rights regarding the three subjects—Defence, External Affairs, and Communications. Much need not be made of the clause recognising the Nizam's sovereignty. It has been the same with all the States and an extra mention of it makes little difference. In fact the phrase 'without prejudice to the Ruler's sovereignty' is implied in every Instrument of Accession as long as jurisdiction is claimed by the Dominion in respect of the three subjects ceded. The Agreement with the Nizam has proved a failure. Negotiations for a permanent solution of the problem have not yielded fruit.

There seems to be little likelihood of any amicable settlement in view of the stand taken by the Nizam. He is not ready to stop

the savage activities of the Razakars - a private Muslim army organized by the fanatical political party, the Ittihad-ul-Musselmin. He is against transferring power to his people on any rational democratic basis. He is dogmatically adhering to the fantastic principle of parity between 13 percent Muslims and 87 percent of the rest. His political mathematics can never commend itself to any modern statesman who thinks in terms of the peoples' right of self-determination. On the ground that there has been a violation of the Agreement by the Nizam, the Dominion Government has imposed a partial economic blockade. The Standstill Agreement has come to a standstill. The only way out of this imbroglio is for the Nizam to democratise the administration and abide by the will of his people.

Now turning to the States which have acceded, and Travancore was perhaps the last to do so, they were a legion in number at the time of accession. Most of them did not possess even the semblance of democracy. It was for the Dominion Government to devise suitable ways and means to fit them into the new constitutional structure of the country. It lost no time in doing so. Their number is fast diminishing. For some years past the Paramount Power was alive to the need of co-ordinating these in such a manner as would facilitate their administration. It is with this object that Linlithgow introduced his schemes of attachment, unification and even merger. He could not do the last two things. They affected the Princes' sacred sovereignty and the integrity of their States. In their Memoranda, the Cabinet Mission stressed the need of the Princes "doing everything possible to ensure that their administrations conform to the highest standards." They added : "Where adequate standards cannot be achieved.....they will no doubt arrange in suitable cases to form or join administrative units large enough to enable them to be fitted into the constitutional structure."¹ This was a pious hope. It was the Dominion Government that had to take the initiative. In some cases self-preserving instinct actuated the formation of Unions. The Ministry of States was naturally keen on having complexities and anomalies removed, in the larger interests of

1. Mitra, *The Indian Annual Register*, i, 1946, p. 211.

the unity and security of India. How could about five hundred and sixty States enter the Union as federating units? ¹⁾

The success of a federal State invariably depends on the existence of homogeneity among its members. "How far homogeneity of the specifically political structure is required, it is difficult to say.....The history of Federation shows that in as close a constitutional association as Federal union, homogeneity of the political structure of members States is indispensable."¹ The Indian States presented a spectacle of absolute heterogeneity. The problem before the States' Ministry was, how to convert them into units eligible for membership of the Federal polity? It is one thing to say that they fall in line with the rest, irrespective of their size and resources, chance given. But they have certain innate defects which cannot be cured after a stage. The system of government, for example, could not be rectified after their entry into the federation. "Once an Indian State is admitted..... its position could not be altered.....except by a process of constitutional amendment.....There can be no general expansion of these powers."² One need not be told what a cumbersome and complicated process 'a constitutional amendment' in a federation is. Then what about the number of States and the number of problems? "The principal weakness of Federal idealism has been that it has, to some extent, put the cart 'without wheels' before the horse 'which is not there'. Enthusiasm for Federal union springs from the recognition of a social and political community."³

No federal State succeeds unless the diverse units are equal in their constitutional status. Further there must be 'a combination of strong common interests,.....common political, religious or social ideals, geographical contiguity' "⁴ Notwithstanding the Princes' 'profession of having the interests of the motherland,' they

1. Friedmann, *The Decline of the National State*, p. 178 ;

2. Gadgil, *The Federal Problem in India*, p. 183 ;

3. Friedmann, *ibid*, p. 121 ;

4. *ibid*, p. 120.

have generally occupied themselves with their own rights, titles, and dignities. They were for the perpetuation of their dynastic rule; the Dominion is for a republican form of government. The Princes were assured that the abolition of monarchical States was not contemplated. Still, the political ideals are different. The Dominion has pledged its faith in democracy; the Princes, only after the 15th August, and bowing to the inevitable, began to grant power to the people. In regard to the sending of representatives to the Constituent Assembly they urged that all of them must be their nominees and this was not acceptable to the Government of India. An agreement was reached by the Negotiating Committees representing both that at least half the number of representatives were to be sent after due election. At every stage there have been conflicts of political ideals. To secure a community of interests between the States and the Dominion, the Ministry of States had to resort to these steps, namely, (1) Democratisation (2) Unification (3) Integration (4) Merger and (5) Direct Administration.

The States' Ministry has consistently and strenuously urged the Princes to appreciate the legitimate, political aspirations of their subjects. Long before the transfer of power by Britain to India Pandit Jawaharlal Nehru had said: "It is exceedingly important that urgent steps should be taken to introduce responsible and democratic government. As soon as the people and the government are one, most problems vanish"¹ Though their neighbours in the Provinces enjoyed political power, the people of the States were, in many cases, not even in possession of civil liberties. Sardar Vallabhbhai Patel assured that "There will be no discrimination between the people of the Provinces and the people of the States in the degree of freedom enjoyed by them."² But how could this promise be fulfilled? In many cases the Princes were reluctant to concede the demands of their subjects despite the hard fact that they had only one choice—to democratise or to perish. The Dominion Government has never initiated any popular movement for responsible

1. *Annual Register* 1946, vol. i P. 213.

2. *Times of India*, 5-3-48.

government in the States; but it has always appreciated the justice of the cause and given its moral support. It has also endeavoured to put a wholesome restraint on the unbridled zeal of the States' people. As a result of the new policy, within a few months after the disappearance of the old Political Department, responsible governments were instituted in a large number of States. Credit is due to the States' Ministry which has succeeded in securing the democratisation of many large States like Gwalior, Baroda, Udaipur, Indore, Jaipur, Jodhpur, Bikanir, and even Bhopal.

Democratisation is not an end in itself. A State cannot claim to remain as a separate entity if it lacks adequate means for such an existence. It was both politically and economically impossible for many States to retain their status as distinct units. The old Political Department adhered to its creed, "Once a native State, always a native State."¹ It would not take any measures at reorganizing them into sizable ones by some process of amalgamation. Its attachment schemes were half-hearted. They were not directed towards the elimination of non-viable States. On the other hand, now that with the lapse of British Paramountcy the old treaties have *ipso facto* lapsed, the national Government is not bound, either legally or morally, to perpetuate the pernicious system which was considerably responsible for the disintegrated condition in which India was on the eve of independence. It was once considered that a State, with an annual revenue of about a crore of rupees, and a population of a million, was a viable unit. But latterly it has been seen that many large States are also finding isolation difficult. This is particularly so when the people of the States are for closer association with the rest of India. Self-interest urged the Princes to sink their personal differences and consolidate their position by organising their States into viable Unions. This was a collective enterprise. The Rulers of the Deccan States were the pioneers. But their efforts failed as their subjects were not in favour of the scheme. Similarly the attempts of the Orissa States' Rulers in the formation of an Eastern States Union, fell through.

1. Lee-Warner, *op. cit.*, p. 33.

The first and most momentous success in unification is seen in the creation of Saurashtra, a cosmos out of a chaos that prevailed in Kathiawar. It comprises 449 diverse units including 13 salute States and 107 non-salute States. The recitals in the Covenant of the Union reveal the genuine desire of the Rulers to promote the interests of their people by entering into a Union. They have agreed to set up an elected Constituent Assembly to frame a democratic constitution for Saurashtra as an integral part of the Indian Union. There is also provision for a Presidium of Rulers and for the election of a Rajpramukh. Next we see the Matsya Union consisting of the important Eastern Rajaputana States of Bharatpur, Alwar, Dholpur, and Karauli. Then follows the Rajasthan Union with the historic Udaipur among its members. The Bundelkhand and Bagelkhand States formed themselves into the Vindhya Pradesh Union with the Ruler of Rewa as Rajpramukh. The Madhya Bharat Union was inaugurated by Pandit Nehru on the 22nd May 1948. It is the biggest of its kind. Rulers of premier States like Gwalior and Indore, notwithstanding the fact that they could have remained apart and retained their signiorial rights over their feudatories, agreed to forgo their individuality and participate in the scheme for the common good of the country. The Covenant of this Union is remarkable for some special features. It cedes jurisdiction to the Central Legislature in respect of all subjects set forth in Lists 1 and 3 of the Seventh Schedule to the Government of India Act 1935, except the entries in List 1 relating to any tax or duty. Consequently this Union resembles a province in many essential respects. The gulf between the two is narrowed down. The Phulkian and other States combined themselves into Patiala and East Punjab States Union. Adverting to this event Sardar Patel observed that "with the formation of this Union the process of integration of Indian States is practically complete."

The Union of Simla Hill States under the name Himachal Pradesh is a unique instance of integration into a Province. These were non-jurisdictional States. Between merger in Province and integration into an autonomous unit a *via media* was found. The States are constituted as a Province under the Central Government which administers it through a Chief Commissioner pending the appointment

of a Lieutenant Governor as provided for in the Draft Constitution of India. Elsewhere the process of integration has assumed the form of merging the States in the Provinces. This was rendered inevitable owing to the inability of a large number of petty States to maintain law and order after the withdrawal of British authority. For example, in the Eastern State of Nilgiri, there was such anarchy that the Ruler was obliged to seek the intervention of the Government of India. The Dominion Government introduced a Bill in the Indian Parliament with the object of securing "powers to interfere in those areas of semi-jurisdictional or non-jurisdictional States where there was danger of anarchy prevailing."¹ It was stated that "Apart from the execution of the Instrument of Accession there had been cases where, in the interests of the States themselves and for their own protection, the States approached the Government of India to exercise jurisdiction over them."¹ The Minister for States said thus: "The Government of India did not seek to assume jurisdiction over the States by means of legislation..... There was no reason to assume that because Paramountcy had disappeared there was going to be no power in India. The Government of India proposed to function as a Government and would not allow any vacuum or anarchy to develop in any part of the country."¹ The Bill was passed in the Dominion legislature and became law.¹ The result of intervention to bring about order in the disturbed Eastern States was that the Rulers themselves, realising the hard days ahead, voluntarily agreed to their States being taken over. Accordingly the Eastern and Chhattisgarh States were integrated with Orissa and the Central Provinces and Berar respectively.

Integration may be *into* a State, *into* a Province, or *with* a Province. Where it is the last it assumes the complexion of merger. The two expressions are not synonymous; but the difference between them is one of degree and not of kind. The meaning of integration depends on the particular context. Merger involves the effacement of a State, that is, its total disappearance from the political map of

1. Times of India; dated 11-12-47;

2. Extra-Provincial Jurisdiction Act, No. XLVII of 1947.

India. The State is wiped out of its existence. Integration *per se* does not imply extinction or dissolution of a State. It is a bringing together or combining them into a whole. States may retain a considerable measure of their individuality *inter se* despite integration whereby they become component parts of a composite polity; but *vis a vis* the Dominion they can have no separate personality. Where States are assimilated with a Province, they may be said to have lost their character and identity. Integration becomes indistinguishable from merger, when the States concerned get absorbed in the Province.

The integration of Orissa and Chhattisgarh States was followed by similar measures. The Deccan States were merged in the Province of Bombay on the 10th March 1948. Under the Extra-Provincial Jurisdiction Act the Central Government delegated the necessary powers to the Government of Bombay in respect of the governance of the merged areas, reserving for itself powers of supervision and direct administration. A large number of Gujarat States, including those in the Mahikantha and Rewakantha Agencies, in all 18 major, 142 minor ones, were merged on the 10th June 1948. Banganpalle and Pudukotah were similarly merged in Madras.

In the case of a few other States the States' Ministry has adopted another policy. It has temporarily assumed the administration of Jaisalmir pending final settlement of its constitutional future. This step was taken for political and military reasons as the State was a vulnerable spot in the frontier. On similar grounds the State of Cutch was taken over. The Maharao readily agreed to the placing of his State, "the frontier outpost of India" as Sardar Patel called it, under the Central Government. In view of the administrative, strategic and military importance of the State, it is now treated as a Centrally-Administered Area or a Chief Commissioner's Province. The Government of India had to interfere in the affairs of Kolhapur and supersede the Interim Ministry which was functioning there as serious allegations were made against it consequent on the grave disturbances which followed the assassination of Mahatmji. The Government of India consulted the Maharaja and acted after the latter's consent had been given for the dismissal of the Ministry and

the appointment of an Administrator during the pendency of some investigations.

In addition to the foregoing measures, the States' Ministry has taken yet another step. This is directed towards strengthening and improving the administration of the States. A senior officer of the Government of India has been specially deputed to advise and assist the States' governments. This measure is not to be mistaken as an encroachment upon the autonomy of the States. There has been no desire on the part of the Dominion to oust the jurisdiction of the Rulers and reimpose the authority of the old Political Department. When it is reported that the Ministers in most of the States are raw and that in many States the administration is unaware of what a budget is, the wisdom and good faith of the States' Ministry cannot be questioned.

But still critics of the New Deal, as of any good institution for that matter, have not been wanting. Despite the States' Ministry's disclaimer, they insinuate that a revival of Dalhousie's policy is in evidence. Some go to the length of finding a parallel to his doctrine of lapse in the present scheme of merger. The two are poles apart. Attention may be drawn to Article 271 of the Draft Constitution of India which gives statutory guarantee to the Princes against the application of the dreaded doctrine of escheat. There was a statement made in the Indian Parliament on the 15th March 1948 which contains a clear declaration that the States' Ministry would in no case apply any scheme of merger or integration to any State unless both the Rulers and people desired otherwise. Merger is resorted to only on the basis of consent; Dalhousie never bothered about ascertaining the wishes of the Ruler or his people. For example his annexation of Oudh in 1856 was 'a sovereign act of State.'¹ As Paramountcy was not assigned, new bonds had to be forged between the States and the Dominion. Confidence begets confidence and it must be said to the great credit of the Princes that they have latterly played a highly patriotic role. Naturally whatever the States' Ministry has been doing

1. *Doss vs. Secretary of State for India*, L.R. 19, Eq. 509 (Morton)..

has its strength in that new spirit of trust and confidence ushered in by freedom. It has gone neither too far nor too fast.

To mark its first birth-day the States' Ministry published a White Paper on the 5th July 1948. It describes the work done by the Ministry in bringing about a 'bloodless revolution' in the States. Certain figures given in that document speak for themselves. They are contained in a tabular statement appearing as an Appendix, at the end of this volume. The White Paper reveals the 'main principles underlying the States' Ministry' policies—a process of twofold integration; first, consolidation of States into viable units; and secondly, democratisation of their administrations, thereby welding India into a constitutional unity." It ends with a warm tribute to the Princes, who, "by their ready appreciation of the aspirations of their people, made integration of States in larger units, and transfer of power to the people, smooth and peaceful." It adds, "They may well claim to be the co-architects in building a free and democratic India in which the people of the Provinces and the people of the States will enjoy the full measure of freedom and march together as citizens of free India." This is generous and noble praise indeed and most of the Princes deserve it.

The White Paper analyses the States' Ministry's policy under what it calls a 'Four-fold Dispensation'; namely, (1) Merger of States in Provinces; (2) Integration of States into Centrally-Administered Areas by consolidation; (3) Integration of States into new viable Unions; and (4) Recognition of a few viable States as individual units. Kashmir, Junagadh, and Hyderabad are not dealt with as their cases are of a special character. Nine non-viable States deserving liquidation are also mentioned as pending cases.

What is that authority behind all that the Government of India has done? Where from is that driven? For the security of India and the freedom of all Indians the Dominion Government has exercised certain powers which are beyond the terms of the Instruments of Accession, however enlarged their scope, and other agreements. A federal constitution for India is contemplated by the Draft and

it is necessarily going to be a rigid one. Any exertion of authority outside the Constitution would be technically 'unconstitutional'; nor can the Union wait for an amendment whenever contingencies demand an extension of jurisdiction. None can anticipate all eventualities and provide for them in advance. The constitution of a composite State like the Union is bound to react upon the component units; for a constitution is not after all a pigeon-hole with mutually exclusive compartments. The *nexus* between the Union and its monarchical units cannot thus be restricted to matters mutually agreed upon. The Dominion Government possesses the right of protection. Coupled with it, and inseparable from it, it has a right of preventive or punitive intervention. Mere residuary powers or federal jurisdiction will be of little use. This new authority can be called a special type of Paramountcy. It is the pre-eminent privilege of the nation itself. It is not the imperial power of an autocratic foreign Crown. Only when the States cease to be what they have been, this New Paramountcy will disappear. Till then it has considerable work to do.

The Government of India was obliged to exercise its Paramountcy rights. What else are the rights of protection and intervention? The only difference between British Paramountcy and the New one is that the source of authority of the former was treaties etc., and that of the latter is the sovereign will of the people of a free India. The one was interested in maintaining the undemocratic rule of the Princes; the other has transformed the country into a union of democratic units. The old Paramount Power intervened when it suited its imperial ends; the present one has done so in the interests of the security and freedom of India. It interfered in the affairs of Alwar. It got the brothers of the ex-Rulers of Rewa and Bharatpur arrested. It took analogous steps in other States also. The Rulers have received their due. Some of the ex-Rulers of Orissa States seem to have begun to foment trouble; they will soon regret their step.

There are still some problems facing the Dominion Government. It may not be long before the Hyderabad *impasse* is satisfactorily ended. This is the only State which can be considered a national

problem. The case of Kashmir is encouraging. Junagadh may soon get integrated with Saurashtra. The remaining States create purely local or provincial problems. Where the people of these States are for a wider life which integration brings about, and the Princes are for separate existence, conflicts are sure to arise. Bhopal cannot remain apart from the Madhya Bharat Union of which the Nawab does not probably want to be a junior member. Travancore and Cochin may have to form part of Kerala. Jaipur, Jodhpur and Bikanir may join Rajasthan or form a new Union. Jaisalmir's separate existence on the frontier is impossible. Sandur will soon be assimilated in Karnatak inspite of its Ruler's presumptuous bid for political isolation. Even Mysore may become integrated with Karnatak instead of its acquiring adjoining Kannada areas and retaining its name and individuality as provided for by a resolution of its Constituent Assembly. The Maha Utkal movement will decide the constitutional future of Mayurbhanj and similarly the Greater Gujerat scheme is not unlikely to absorb Baroda. Kolhapur cannot remain unaffected by the Brihanmaharashtra wave. Manipur and other States have their political fortunes linked with their neighbouring Provinces. The non-viable States cannot live long; the viable ones too have an existence which rests on the choice of their people irrespective of the desire of their Rulers.

That power which has, in an amazingly brief period, changed the political map of India, is the New Paramountcy. It is mostly because of the constructive genius of Sardar Vallabhbhai Patel that magnificent success has attended the New Deal. Sri N. V. Gadgil paid a glowing tribute to him when, in his address at Benares, he said: "If Gandhiji is the architect of our freedom, Sardar Patel is the architect of the Indian Union."¹ And this he achieved "without uttering a single harsh word, but by persuasion and appeal to the highest patriotism."

1. Times of India, 5-3-48.

CHAPTER XXI

Recapitulation.

A brief retrospective survey of the ground traversed is attempted here. What is given is a bare summary of each of the chapters.

British authority in India manifested itself as sovereignty and Paramountcy. They are interdependent. Though not a juridical concept, Paramountcy is not unamenable to legal analysis. For a clear exposition of its incidents and implications, it is necessary to draw material from the spheres of jurisprudence, constitutional law, international law, political science, and constitutional history. It belongs to a special branch of imperial constitutional law. As a political system it followed the British Empire; but its doctrinaire value remains undiminished. Its resurgence in a new form confers a special importance to it.

It is not possible to define Paramountcy with any precision. It is not a pure concept; it is pluralistic and progressive. It was not established on any legal hypothesis. Primarily non-technical, it has acquired a technical character. It is a nebulous word standing for many things. It is both concrete and abstract; it signifies a system as well as a doctrine. It is so compendious as to include a method, a relationship, and a complex of rights and duties. It is also an attribute of the Crown's sovereignty in India. Its essential meaning is the authority of the Crown, in its capacity as sovereign of India, over the Indian States under its protection.

In the absence of a precise definition it is difficult to determine the scope of Paramountcy. It is not so wide as to cover the entire field of relations between the Crown and the Indian States; nor is it restricted to matters mutually agreed upon. At first it was limited to the sphere of treaty relations. Under the influence of political practice and usage it steadily expanded. In the long-run it virtually became coextensive with absolute supremacy. It is not all pervasive:

its ambit is well-understood. Although it is an authority common in principle in respect of all the States, in practice its incidence has varied. It has grown like the English Common Law. Parliament could determine the extent of Paramountcy.

Legal theories of Paramountcy are advanced by the Princes. Paramountcy is more a political power than a legal right. It is possible to stress either aspect of the institution. But they are not mutually exclusive. The Princes try to explain Paramountcy in terms of international law, interstate law, principles of contract, trusts, and grants. None of the theories taken by itself is convincing; nor are they adequate if taken in any combination. Each has certain acceptable features. On ultimate analysis it will be seen that any attempt to interpret the relationship between the Crown and the Indian States exclusively on legal grounds fails. There is more politics than law in it.

Both imperialist and nationalist writers reject the legal theories, but on different grounds. For a long time the doctrine of feudal relationship reigned supreme. Some prefer to regard the relationship as governed by 'Indian Political Law'. That Paramountcy was *co-extensive with the rights and obligations flowing from a military protectorate* is another view. Some interpret it in terms of a distinct prerogative of the Crown. It has also been maintained that it involved a personal tie between the Princes and the Crown. The applicability of each of these doctrines is conditioned by diverse factors. The most satisfactory view is to regard Paramountcy as belonging to a very special part of the constitutional law of the Empire, as applied to the Indian States.

'Paramountcy' and 'Suzerainty' are not convertible although established practice treats them so. Late in the last century the Indian Princes who were till then described as in alliance with the Crown, were defined by statute as under the Suzerainty of the Crown. In its generic sense Suzerainty includes Paramountcy; but it does not mean it. It signifies feudal overlordship, international guardianship, or imperial authority. When vassal and protected States are compared and contrasted with each other the distinction between Suzerainty and

Paramountcy become evident. Protected States possess neither international status nor even full sovereignty. They are subject to intervention independently of agreement. On the other hand vassal States, notwithstanding their name, enjoy a larger measure of sovereignty and in some cases possess some international life; but their title is derivative.

There are diverse forms of international and imperial control. The British Empire contains practically all specimens of super-statal authority. British protectorates are broadly divisible into Colonial Protectorates and Protected States. The Indian States resemble the latter in many respects. Although they are protected States, they are not Protectorates in the strict sense of the term. Mandates are another species of external control. They are international institutions. Yet there is one more system akin to Mandates and Protectorates. It also involves imposition of alien authority to the exclusion of others and at the expense of the local people. It is the 'Sphere of Influence'. It is more an economic than a political monopoly. A comparative study of these is instructive as it reveals the uniqueness of Paramountcy.

Paramountcy is the child of history. Its historical origins are not by themselves relevant for our purposes. The legal sources of Paramountcy are divisible into formal and material. The formal source of Paramountcy lay in the sovereign will of the British Parliament. Its material sources which have some legal value are not strictly speaking legal sources. They cannot be judicially scrutinized. They are, Acts of Parliament (indirectly operative), the Crown's prerogative, principles of natural justice, treaties and other instruments, political practice, usage and sufferance. Although Parliament would not normally legislate for the States, its jurisdiction delegated by it to the Crown under the Foreign Jurisdiction Act, indirectly affected the States. As much of the exercise of Paramountcy was based on the discretion of the Crown, prerogative may be considered one of its sources.

Antecedents of Paramountcy may be traced to the early history of the East India Company. It is necessary to understand the pre-Paramountcy position of the Indian States in view of certain claims

made by the Princes and their supporters. It was when the Company acquired the *Diwani* from the Emperor that the political complexion of the Company may be said to have been fixed. There had already been some intercourse between the Indian Rulers and the Company. The later eighteenth century contacts are anticipatory of the establishment of Paramountcy. By the end of the century the Company succeeds in bringing under its influence a good number of States by means of treaties of subsidiary alliances. The way for Paramountcy was prepared by a network of treaties by 1818.

The period of relationship between the Indian States and the British authority in India after the latter acquired a *de facto* Paramountcy, is divisible into two distinct epochs. In the beginning the policy was one of unconcern. This proved undesirable after a time. It was followed by one of intervention which, in turn, was succeeded by one of non-intervention. Annexations were expedient devices which the company resorted to in preference to intervention. The Company's trusteeship for the Crown ended on the latter's assumption of the governance of India in 1858. The period of treaties was replaced by one of political practice and usage. Intervention becomes frequent. Paramountcy may be said to have reached its climax during the days of Curzon.

Treaties and other instruments between the Indian Princes and the East India Company cannot be treated as international covenants, nor can they be regarded as contracts under civil law. Treaties, Engagements and *Sanads*, are distinguishable. The difference lies more in form than in substance or effect. These instruments may collectively be styled 'Treaties.' Treaties are both the source and issue of Paramountcy. A chronological study of these documents reveals the shifting of the relationship from an international to an imperial plane. In regard to their interpretation, rules of international or municipal law are inappropriate. They are more records of political data than title-deeds.

Political practice played an important part in the moulding of Paramountcy. It began its active career after the Crown took over the Government of India. At first the department of the Government

dealing with the States was called 'Foreign'. Later it was called 'Political'. The Department built up an imperialist tradition most assiduously and systematically. It developed a 'case-law' made of political decisions and 'judgments'. Treaties began to be interpreted in the light of usage, which was not one based on consent. Latterly the Princes were being consulted in regard to certain matters; a new convention was initiated as a result of the representation of the Chamber of Princes.

The main fields for the operation of Paramountcy were three namely, external relations, defence, and intervention. The Paramount Power resorted to intervention on certain ascertainable grounds and independently of treaties. The Crown had a general right to interfere in the interests of the Ruler, of the State, of the subjects of the State, of India as a whole, and of the Empire itself. The treaties themselves are so worded as to reserve rights of interposition in favour of the Paramount Power. There have been few occasions when the Crown intervened solely in the interests of the people of the States.

It is claimed that the Paramount Power was the Crown. But whether it was so as King of England or as the Emperor of India is not clear. It is argued on the other hand that the Government of India was the seat of Paramountcy. The Crown, as sovereign of British India, was more than a mere channel of authority. It was the immediate Paramount Power. The relations of the Indian Princes were all along with the Government of India, and through it, with the Crown, after 1858. The treaties were entered into by both the parties in their political capacities. The fact that the Governor-General personally dealt with the Princes and was regarded as a 'Viceroy' does not make any difference.

The Crown as Paramount Power could not have had duties properly so called. At best its 'duties' were those of imperfect obligation. The Princes were subject to many disabilities and exposed to certain liabilities. Before introducing constitutional reforms they had to obtain the approval of the

Paramount Power. But they were not prevented from transferring power to their people in the form of instituting responsible government, provided safeguards were secured for the due fulfilment of Paramountcy obligations. The loyalty of the Princes to the Crown was not mere personal devotion; it was legal obedience. The Crown has discharged another obligation undertaken by it in not assigning Paramountcy to any new Government without the Princes' consent.

The Indian States are not States in the full sense of the term. They have no international status; they possess no independence, and their sovereignty is twice-divided. Yet it would not be inaccurate to regard them as States, for, no modern State is absolutely independent or sovereign. Sovereignty under Paramountcy is not a paradox. The Indian States were all of one class as far as their subordination to the Paramount Power was concerned. *Inter se* they exhibit bewildering diversity—some were full-powered States; a large number were non-jurisdictional. There are feudatory Jāhگیرs and mediatised Principalities. Some semi-jurisdictional States were attached to larger ones. Their integrity was not impaired thereby.

'Exterritoriality' and 'Extra-territoriality' are not identical in meaning. The former can more properly be applied to personal privileges or immunities enjoyed by specified individuals from the jurisdiction of municipal law. Extra-territoriality is a quality possessed by the law by virtue of which its jurisdiction is extended beyond the territory of the State, while exterritoriality is an exemption from jurisdiction. They are mutually complementary. The Crown exercised extraterritorial jurisdiction in the States either on the basis of its Paramountcy or under the Foreign Jurisdiction Act.

Paramountcy began a course of descent during the Viceroyalty of Lord Minto. The process was accelerated by two factors, the awakening of national consciousness in British India and the outbreak of the first World War. The Crown commenced a policy of placating the Princes. They were under compulsory isolation for a long time; henceforth they were allowed and even encouraged to mingle with one another freely. They were permitted and advised to constitute themselves into a body, the Chamber of Princes, for

purposes of deliberation. They were invited to take part in the Round Table Conference. At first they were enthusiastic about entering into federal relationship with the rest of India. But later their ardour cooled down, as accession to the Federation involved no escape from Paramountcy.

On the 15th August 1947 *British* Paramountcy lapsed. The successor Dominion Government could not be deprived of Paramountcy as it is inseparable from the sovereignty of British India. If Britain did not transfer Paramountcy but renounced it, it does not follow that it would not devolve on the Government of India. The Indian States could not become independent on the lapse of British Paramountcy. The Cabinet Mission declared that the States would be free to enter into fresh relations with the successor Dominions. The Princes were advised to bear in mind economic and geographical factors and the wishes of their people before electing to accede to either Dominion. Almost all the States acceded before the 15th August 1947 and ceded jurisdiction to the Dominion over Defence, External Affairs, and Communications.

The relations between the Union and the States cannot be covered by Instruments of Accession or additional agreements. There must be some wide discretionary authority to solve problems and meet eventualities. The States cannot claim a status of equality with the Union when it comes into being. Problems of protection, boundary and border disputes, succession controversies, and more than all, recognition of the rights of all Indian people, may lead to intervention. The Dominion Government cannot wait for a treaty at every stage. 'Federal authority' is not sufficiently strong and elastic. Current measures such as democratisation, integration, unification, and even merger, are the phases of the New Deal. The New Paramountcy is national, democratic, and popular, as distinguished from the old one, and has its source in the sovereign will of the people of a Free India. Its main task is to convert all the units of the forthcoming Federal union into homogeneous democratic ones.

APPENDIX

Tabular Statement showing the position of Indian States.

Number of States as on 14-8-1947	...	...	...	...	562
After 15-8-47					
Independent States,	2				Bhutan and Sikkim
Pakistan States	...	...	...	3	(Kalat, Bahawalpur and Khairpur)
States whose cases are anomalous	3				(Hyderabad, Kash- mir, Junagadh.
The rest	...	...	...	...	554
					<hr/> 562

A. States merged in Provinces.

<i>Province</i>	<i>Number of States</i>	<i>Area in square miles</i>	<i>Population in lakhs</i>
Orissa...	23	23, 637	40.46
C. P. & Berar	15	31, 749	28.34
Bihar	2	623	2.08
Madras	2	1, 444	4.83
East Punjab	3	370	.80
Bombay...	174	26, 951	43.67
	<hr/> 219	<hr/> 84, 774	<hr/> 120.18

B. States consolidated into a new Province (Centrally Administered Area.)

<i>Name of new area</i>	<i>Number of States</i>	<i>Area</i>	<i>Population in lakhs</i>
Himachal Pradesh...	21	10,600	9.36
Kutch...	1	8,461	5.01
	<hr/> 22	<hr/> 19,061	<hr/> 14.37

C. States integrated into viable Unions.

<i>State</i>	<i>Number integrated</i>	<i>Area</i>	<i>Population in lakhs</i>
Saurashtra... ..	217... ..	31,885	35.22
Matsya... ..	4... ..	7,536	18.38
Vindhya Pradesh... ..	35... ..	24,610	35.69
Madhya Bharat... ..	20... ..	49,273	71.50
Rajasthan... ..	10... ..	29,977	42.61
Patiala and East Punjab States Union... ..	8... ..	10,119	34.24
	294	150,400... ..	237.64

**D. Viable States so far constitutionally unaffected by the
'Four-fold Dispensation.'**

Baroda, Bhopal, Bikanir, Cochin, Jaipur, Jodhpur, Kolhapur,
Mayurbhanj, Mysore, and Travancore.....10.

E. Non-viable States pending liquidation.

Benares, Cooch-Bihar, Jaisalmir, Khasi Hill States, Manipur,
Rampur, Sandur, Tehri-Garhwal, and Tripura.....9.

Abstract of 'Balance-Sheet'.

Number of States before 15th August 1947, 562

Pakistan States... ..	3
Independent... ..	2
Kashmir, Junagadh, Hyderabad	3
Merged in Provinces... ..	219
Integrated into new areas	22
Integrated into Unions	294
Pending integration	9
Viable States	10
	562

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